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No. 80-660

# In the Supreme Court of the United States

OCTOBER TERM 1980

SILVER SPUR CASINO,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

AND RELATED CASES.

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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## QUESTIONS PRESENTED

1. Whether there is a conflict between the decision sought here to be reviewed and decisions on the same matter of federal law of other Courts of Appeals.

2. Whether there is a conflict between panels of the Court below on the same matter of federal law.

3. Whether there is a conflict between the decision here rendered by the National Labor Relations Board (the Board) and other decisions on the same issue rendered by the Board.

4. Whether the Court below was in error in holding that the Board may ignore federal law and for policy reasons establish a presumption based upon two other presumptions.

5. Whether the Board establish a rebuttable presumption to which is given mere lip service and which in actual practice as applied by it is an absolute and irrebuttable presumption resulting in denial of due process.

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# In the Supreme Court of the United States

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SILVER SPUR CASINO,

*Petitioner,*

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NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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NEVADA CLUB, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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FINALLY, INC. d/b/a THE PALACE CLUB,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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The Petitioners, SILVER SPUR CASINO (Silver Spur), NEVADA CLUB, INC. (Nevada Club), and FINALLY, INC. d/b/a THE PALACE CLUB (Palace Club), respectively, pray that a Writ of Certiorari issue to review the judgments and opinion of United States Court of Appeals for the Ninth Circuit entered in these proceedings on July 14, 1980. Two other respondent-companies in the proceedings below, BARNEY'S CLUB, INC. and SPARKS NUGGET, INC. d/b/a JOHN ASCUAGA'S NUGGET, will file separate petitions with this Court as to the separate judgments relating to separate matters which the Court of Appeals entered on August 18, and September 12, 1980, respectively. Petitioners here have common questions of fact and law which warrant separate consideration.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 623 F.2d 571. A copy of the opinion appears in the Appendix hereto.

## JURISDICTION

The opinion of the Court of Appeals was filed on May 27, 1980. The judgments for each Petitioner, SILVER SPUR NEVADA CLUB and PALACE CLUB were entered on July 14, 1980. A copy of each judgment appears in the Appendix hereto. Separate judgments were entered on August 18, 1980 and September 12, 1980, respectively, as to BARNEY'S CLUB, INC. and SPARKS NUGGET, INC. d/b/a JOHN ASCUAGA'S NUGGET who are filing separate petitions to this Court. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether there is a conflict between the decision sought here to be reviewed and decisions on the same matter of federal law of other Courts of Appeals.

2. Whether there is a conflict between panels of the Court below on the same matter of federal law.

3. Whether there is a conflict between the decision here rendered by the National Labor Relations Board (the Board) and other decisions on the same issue rendered by the Board.

4. Whether the Court below was in error in holding that the Board may ignore federal law and for policy reasons establish a presumption based upon two other presumptions.

5. Whether the Board may establish a rebuttable presumption to which is gives mere lip service and which in actual practice as applied by it is an absolute and irrebuttable presumption resulting in a denial of due process.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*U.S.C., Constitution, Amendment 5:*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

*United States Code, Title 29:*

§ 158(a)(5): It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employess . . .

§ 160(b): Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board

for such purposes, shall have the power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place fixed, nor less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . . Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States . . .

## STATEMENT OF THE CASE

From 1951 to December 12, 1974, NEVADA CLUB was a member of a multi-employer group known as the Reno Employers Council (the Council). From 1968 to December 11, 1974, SILVER SPUR was a member of the Council. From 1969 to December 11, 1974, PALACE CLUB was a member of the Council. By December 12, 1974, SILVER SPUR, NEVADA CLUB and PALACE CLUB had timely withdrawn their memberships from the Council. During their periods of membership, each Petitioner was represented by the Council in collective bargaining and were parties to the Council's multi-employer collective bargaining agreement with Local 86 of the Hotel-Motel-Restaurant Employees International Union (the Union). Thereafter, the Petitioners' status was that of a single employer unit.

Based upon certain information which came to their respective attention, the managers of each Petitioner had a good faith doubt as to whether the Union continued to rep-

resent a majority of their employees. This prompted the withdrawal from the multi-employer unit.

There had never been a representation election, either in the larger unit or the individual units. By letter, on the dates mentioned, each Petitioner informed the Union of its withdrawal from the Council and the multi-employer unit, and that they were terminating the existing collective bargaining agreement effective as of the end of the term thereof. Subsequently, the Union's attorney wrote each Petitioner requesting that individual bargaining take place. Petitioners' attorney responded on behalf of each that they had a genuine doubt that the Union represented an uncoerced majority in an appropriate unit and urged the Union to petition for an election to demonstrate whether in fact they represented a majority. Petitioners, through their attorney, also offered to cooperate to expedite an election. The response of the Union was to file a refusal to bargain charge against each Petitioner.

Thereafter, a complaint issued and the matters were heard before an Administrative Law Judge. The SILVER SPUR matter was heard before Judge Boyce, the NEVADA CLUB and PALACE CLUB matters were heard before Judge Holmes. Before these trials and before the Regional Director issued the complaints, Petitioners filed petitions for separate representation elections. The Regional Director refused to process them on the ground that the charges blocked the election. The Union refused to withdraw the charges or to proceed to an election.

The Administrative Law Judges determined that Petitioners had violated the National Labor Relations Act [61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 15, et seq., §§ 158(a)(1) and (5)] by refusing to bargain. Both Judge's findings were based upon a presumption that the Union continued to rep-

resent a majority of each Petitioners' employees by reason of the multi-employer contract and that by derivation the presumption applied to the new single employer units. Each Judge concluded that the burden was upon Petitioners to prove that their refusal to recognize and bargain with the Union was based upon "a reasonably grounded good faith doubt" that the Union no longer continued to represent a majority of the employees of each Petitioner. Each Judge then proceeded to discuss each objective consideration in isolation and concluded that Petitioners had not rebutted the presumption.

A three-member panel of the Board, with one member dissenting, affirmed the Judge in NEVADA CLUB. In SILVER SPUR and PALACE CLUB, a different three-member panel affirmed the Judge. The Court below in enforcing the Board's orders took the same approach as did the Administrative Law Judges in analyzing the objective considerations.

## REASONS FOR GRANTING THE WRIT

### The Decision Below Conflicts with the Decisions of Other Courts of Appeals as to the Application of the Presumption of a Union's Continuing Majority Status.

The decision of the Court below is in conflict with the Second, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits.

The Court below concedes as we shall point out, *infra*, that it is in conflict with these Circuits. The Court, as did the Board, not only departed from and ignored prior precedent as we shall discuss, *infra*, but treated each objective consideration which led Petitioners to raise in good faith their belief that the Union no longer represented a majority of their respective employees, in isolation rather than dealing with their cumulative effect. Such evidence con-

sisted of: (1) that the Union through its trustee publicly stated the Union represented only 20% of the employees in the multi-employer unit, (2) statements by employees that they were dissatisfied with the Union, (3) the Union mounted a desperate membership drive at the time they were demanding continuing recognition, (4) high employee turnover, (5) reports of employees dissatisfaction with the Union, (6) reports of the Union's inactivity, (7) no dues checkoff, (8) low level of membership among Petitioners' employees, (9) there never had been a representation election, (10) the Union had never been certified, (11) admissions by the Union's representative of the Union's lack of support, and (12) the change from a multi-employer unit to a single employer unit.

In *N.L.R.B. v. Alvin J. Bart and Co.*, 598 F.2d 1267 (C.A. 2, 1979) the Second Circuit rejected the Board's use of the presumption of majority status in factual circumstances substantially weaker than those relied upon by the Petitioners here. The Union had prevailed in a Board conducted election. After almost two years of bargaining without agreement, the company withdrew recognition. A supervisor circulated a petition among the employees, advising management that they did not want the union to have their names and addresses. The company then refused to provide the union with the names and addresses of employees and unilaterally granted substantial wage increases. Despite these findings, the Court found that the company had a "serious good faith doubt of the union's majority." In so ruling, the Court relied upon the closeness of the vote, the large turnover in employees, and a statement by a union official of the lack of support from employees. Here, each Petitioner relied on factors similar to those in *Alvin Bart*, as well as several additional factors.

In *W & W Steel Co. v N.L.R.B.*, 599 F.2d 934 (C.A. 10, 1979), the situation is on all fours with the instant cases. Here, the Petitioners properly withdrew from a multi-employer unit and each became a separate, independent unit. In *W & W Steel,* the employer bought a single plant which was part of a multi-plant unit. It questioned the union's majority status in the single plant. The union and the Board took the position, as in the instant cases, that the union's majority in the single plant was presumed to exist because the union had been certified as the bargaining representative following an election in the multi-plant unit. The Tenth Circuit found the employer had a reasonable doubt of the union's majority status and denied enforcement of the Board's bargaining order. The Court pointed out that the election in the multi-employer unit had taken place two years and seven months prior to the employer's takeover of the plant. In the instant cases, there never was an election in any unit. Each Petitioner here joined an employer association many years ago and by reason thereof automatically became a party to a multi-employer contract between the association and the union.

It is significant to emphasize that the dissenting opinion in *W & W Steel* states, "I acknowledge that this presumption has not received universal acclaim", and cites *N.L.R.B. v. Tahoe Nugget, Inc.*, 584 F.2d 293, n. 4 (C.A. 9, 1978), which the Court below relied on principally to summarily enforce the Board orders. The majority in *W & W Steel* place the Tenth Circuit with the Second, Sixth, Seventh, Eighth and District of Columbia Circuits, and contrary to the Ninth, holding that a Board created presumption does not rise to the level of substantial evidence.

The Sixth Circuit in *N.L.R.B. v. Richard W. Kaase Company,* 346 F.2d 24 (C.A. 6, 1965) in dealing with the

presumption of a union's continuing majority status, held that withdrawal from a multi-employer unit invalidated the presumption. The Court said there could be no presumption of continuance of a union's majority status as to a single employer after a year following certification of the union in a multi-employer election of which the employer had been a part. The Court held that before the Board could find the employer in violation of the Act by its refusal to bargain, it is essential to find that at the time of the refusal the union in fact enjoyed a majority status. This burden of so proving, said the Court, was upon the General Counsel. It was there stated (at 31):

> . . . the ambiguity inherent in the multi-employer election here relied on vitiates its efficacy to prove a majority as to any single employer. Before the continuance of the fact of majority support can be presumed, the original existence of that fact must be established.

In *Ingress-Plastene, Inc. v. N.L.R.B.*, 430 F.2d 542 (C.A. 7, 1970), denying enforcement, the Seventh Circuit in considering the objective considerations which there led the employer to question the union's continuing majority status, said (at 547):

> Although the Board attacks each of the reasons advanced by the company in support of its good faith doubt of the union's majority status, the company does not rely on any one reason alone, but rather on all as a whole. We think the entire record, including evidence against the Board's position as well as in favor of it . . . supports the company's position.

Similarly, *Star Mfg. Co., Div. of Star Forge, Inc. v. N.L.R.B.*, (C.A. 7, 1976) 536 F.2d 1192, 1196. See also *Bellwood General Hospital v. N.L.R.B.*, ..... F.2d ....., (C.A. 7, 1980) [No. 79-1818 decided Aug. 11, 1980] where the

Court denied enforcement of a Board refusal to bargain order where the employer showed evidence of good faith doubt shifting the burden to the General Counsel, and the General Counsel could not establish the union's majority status.

In the instant case the Petitioners did not rely on any one reason alone, although they could have under Board precedent as we will show, but rather on all as a whole.

The Eighth Circuit in *National Cash Register Company v. N.L.R.B.*, 494 F.2d 189 (C.A. 8, 1974) reversed a finding of refusal to bargain and denied enforcement, holding the employer on the collective basis of four factors could raise a question as to the union's majority status.

The District of Columbia Circuit in accord with the Second, Sixth, Seventh, Eighth and Tenth Circuits, held an employer who relied upon the cumulative effect of multiple objective considerations, properly raised a good faith doubt as to the union's majority status. *Lodges 1746 & 743, Int. Ass'n. of Mach. & Aero. Wkrs. v. N.L.R.B.*, 416 F.2d 809 (C.A.D.C., 1969).[1]

One of the objective considerations which Petitioners considered was the fact that at the time they joined the multi-employer unit, the union did not represent a majority of either of their employees. The Board rejected this evidence on the ground that Section 10(b) of the Act [29

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1. See also *N.L.R.B. v. Nu-Southern Dyeing & Finishing Inc.*, (C.A. 4, 1971) 444 F.2d 11, in which enforcement of a refusal to bargain order was denied where an employer questioned the union's continuing majority status based on several factors, including an anti-union petition signed by a majority of employees which the Board refused to consider on the ground that the anti-union petition was the result of the employer's 8(a)(1) violations. The Court held that there were factors other than the anti-union petition, which when viewed in their combined effect, established that the company "possessed a good faith doubt of the union's majority status at the time of the refusal to bargain" (at 16).

U.S.C. § 160(b)] precluded any attack on the original recognition by the employer.[2] Section 10(b) is the so-called six months statute of limitations under the Act. The Court below agreed with the Board. Here again we have a conflict between Circuits as to the application of 10(b) under the circumstances. In *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (C.A. 6, 1973), the Sixth Circuit in considering the same argument advanced by the Board in the same type of case, denied enforcement of the Board's order to bargain, holding (at 333):

> The fact that this evidence [relating to initial recognition] could have been the basis of an unfair labor practice charge in 1967 is coincidental and ought not to render the evidence inadmissible for another purpose.

The Board in reaching its conclusion relied upon this Court's opinion in *Local Lodge No. 1424 v. N.L.R.B.*, 362 U.S. 411, 80 S.Ct. 822 (1960).[3] The Court in *Dayton Motels, supra,* distinguished *Local Lodge No. 1424,* rightfully pointing out that it represented a different factual situation to which this Court addressed itself and that it did not preclude the use of all evidence relating to events which transpired more than six months prior to the filing of an unfair labor practice charge (474 F.2d at 333):

> In our case, however, the Company's defense is not dependent on the time-barred unfair labor practice. The evidence was offered, to be considered along with other evidence, of its good-faith doubt about the majority status of the Union.

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2. The Board relied on its earlier decision in *Jim Kelley's Tahoe Nugget,* 227 NLRB 357 (1976).

3. Sometimes referred to as the *Bryan* case.

With respect to the Board's argument, the Sixth Circuit stated (at 333-334):

> Hence, as the Board would have it, an employer who had to decide, at the expiration of an initial contract, whether to continue recognition of an incumbent Union, would have to approach the problem in the following manner: The employer would first look at the events surrounding the initial recognition of the Union to see if those events could cast doubt on the representative status of the Union. He would then have to decide whether those facts also would have supported an unfair labor practice charge. If they did reach the level of proscription under the Act, he could take them into account. If they constituted an unfair labor practice, he could not use them in making his decision.
>
> Such an artificial standard is obviously impractical and one which is well nigh impossible to be complied with. It would substantially impair, if not obliterate, the efficacy of the defense of good-faith doubt. *Bryan* did not involve the exclusion of evidence of good-faith doubt.

As mentioned, the Court below concedes that it is in conflict with the Second, Sixth, Seventh, Eighth, Tenth and District of Columbia Circuits. The Ninth Circuit states in the instant cases:

> We recognize the force of [Petitioners] contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases. (fn.) [The footnote cites the cases from the other Circuits.] Accepting, arguendo, that a conflict exists on this issue,

> we nevertheless adhere to the views expressed in this and our previous opinions. (Appendix, p. 14)

In light of the obvious conflict between the Ninth Circuit and the other Circuits mentioned, this Court should resolve the conflict. The issue is a recurring one in the administration of the National Labor Relations Act. The resolution of the issues involved should not have to depend upon the fortuitous circumstance as to which Circuit may be dealing with them.

**There Is a Conflict Among Panels of the Court Below on the Issue of Rebutting the Presumption.**

In its earlier decision, the Court below held in *Dalewood Rehabilitation Hospital, Inc. v. N.L.R.B.*, (C.A. 9, 1977) 566 F.2d 77 that a combination of factors is adequate to provide a basis for an employer's good faith doubt as to a union's majority status when each factor considered alone is insufficient. In denying enforcing of a bargaining order by the Board, the panel of the Court stated (at 79-80):

> The Board concluded that each factor considered separately did not give petitioner reasonable grounds to doubt the Union's majority status and that the evidence as a whole was no greater than the sum of its separate parts.
>
> • • •
>
> The Hospital contends that all of the factors the administrative law judge considered, taken together, provided the basis for a reasonable doubt of the Union's majority status.
>
> The courts require an assessment of the cumulative force of the combination of factors. [Citations] Even when each factor considered alone is insufficient for a good faith doubt of majority status, the combination may be adequate. [Citation]

> We believe the combination here was adequate. The employee complaints, the turnover, the deauthorization vote and the decline in the number of authorized dues checkoffs all indicate a loss of Union support.
>
> We hold that the Hospital rebutted the presumption of continued majority status. The burden then shifted to the Board to prove that the Union represented a majority on the day the Hospital refused to bargain. [Citation]

Yet, the panel below considered each of the numerous factors in separate isolation, as did the Board, and concluded they were not sufficient for a good faith doubt of the Union's majority status. The factors here were equal to and in excess of those in *Dalewood Rehabilitation Hospital, supra.* This, apart from the fact that the Board laid down the principle in *Celanese Corporation of America,* 95 NLRB 664 (1951) which we shall discuss more fully *infra,* that the answer to the question of whether an employer has violated Section 8(a)(5) of the Act, depends not on whether there was sufficient evidence to rebut the presumption of the union's continuing majority status, but upon whether the employer in good faith believed that the union no longer represented the majority of the employees.

In view of the evident conflict between panels of the Court below, this matter should at least be remanded so the Court of Appeals can reconcile its internal difficulties. *Wisniewski v. United States,* 353 U.S. 901, 902, 77 S.Ct. 633, 634 (1957); *Western Pac. R. Corp. v. Western Pac. R. Co.,* 345 U.S. 247, 260, 73 S.Ct. 656, 663 (1953).

**The Board's Decision Is in Direct Conflict with Its Prior Holdings on the Same Issue.**

In its seminal decision adopting its presumption relating to a union's continuing majority status, the Board in

*Celanese Corporation of America*, 95 NLRB 664 (1951), stated:

> We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 depends, *not on whether there was sufficient evidence to rebut the presumption of the Union's continuing majority status or to demonstrate that the Union in fact did not represent the majority of the employees, but upon whether the Employer in good faith believed that the Union no longer represented the majority of the employees.* The latter point was not considered by the Trial Examiner. [Part of emphasis added] 95 NLRB at 665, 28 LRRM at 1365.

In the instant case the Board relying upon *Tahoe Nugget Inc. supra* departed from its holding in *Celanese* by determining whether there was sufficient evidence to rebut the presumption. It analyzed in isolation each objective consideration which Petitioners had considered in reaching their good faith doubt. The Court below did likewise. It is to be noted the Board held in *Celanese* that the answer lies in whether "the *employer in good faith* believed that the Union no longer represented the majority of the employees." There was no finding, and there could be none, that Petitioners did not in good faith believe the Union no longer represented a majority of their respective employees. It is clear that what the Board said in *Celanese* was that the presumption is overcome if the employer in good faith believes there is doubt as to the union's majority status. Yet, the Board and the Court below substituted their judgment as to good faith belief. The criteria is not what the Board or the Court below, if they had to determine whether there was doubt, would conclude.

Neither the Board nor the Court rationalized their departure from *Celanese* which has not been overruled nor mod-

ified. In fact, the Court below did not properly consider *Celanese.* As stated in *International Union (UAW) v. N.L.R.B.,* 459 F.2d 1329, 1341 (C.A.D.C., 1972) in which the Board was reversed:

> It is an elementary tenet of administrative law that an agency must either conform to its own precedents or explain its departure from them. *See, e.g.,* Secretary of Agriculture v. United States, 347 U.S. 645, 653, 74 S.Ct. 826, 98 L.Ed. 1015 (1954).

Similarly, the Court in *Teamsters Local 769 v. N.L.R.B.,* 532 F.2d 1385 (C.A.D.C., 1976) again reversing the Board, held (at 1392):

> But the Rule of Law requires that agencies apply the same basic standard of conduct to all parties appearing before them. Thus, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[4]

Moreover, in dealing with objective considerations, the Board in *Celanese,* supra, said that whether an employer has questioned a union's majority in good faith "can only be answered in the light of the totality of all the circumstances involved." Yet, the Board and the Court below failed to follow this principle and viewed in isolation each of the numerous factors which impelled the Petitioners to question in good faith whether the union continued to represent a majority.

Assuming, *arguendo,* that the Court below and the Board could, as they did, examine each objective consideration, in so doing they ignored prior Board precedent. Under its precedents in effect at the time Petitioners questioned the

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4. Citing *Greater Boston TV Corp. v. FCC,* (C.A.D.C. 1970) 444 F.2d 841, 852, cert. denied, 403 U.S. 923, 91 S.Ct. 2299, 2233.

Union's majority status, each of the objective considerations which came to their attention were equal to or exceeded what the Board regarded as valid objective considerations at the time. In effect, the Board, without any rationalization, did a full switch in its position. The Court below did not deal with this fact, although brought to its attention.

As to the individual factors which constituted the objective considerations, Petitioners proved: (1) that no election was ever held among the employees to determine whether they wanted to be represented by the Union; *Taft Broadcasting,* 201 NLRB 801 (1973); *Nu-Southern Dyeing & Finishing, Inc.,* 179 NLRB 573 (1969); (2) that a substantial number of employees complained to management that they were dissatisfied with the Union and did not want the Union to represent them; *Peoples Gas System, Inc.,* 214 NLRB 944 (1974); *Southern Wipers, Inc.,* 192 NLRB 816 (1971); (3) that during the period of the latest collective bargaining agreement there was a turnover of 80 to 100 percent among the employees; *Peoples Gas System, supra, Southern Wipers, Inc., supra;* (4) that during the period the collective bargaining agreement had been in effect, the Union never attempted to enforce its provisions by either inspecting the premises or soliciting grievances from employees and never filed a single grievance; *Lloyd McKee Motors, Inc.,* 170 NLRB 1278 (1968); *Peoples Gas System, Taft Broadcasting* and *Southern Wipers, Inc.,* each *supra;* (5) that the Union had experienced serious financial difficulties occasioned by a substantial loss of members; *Peoples Gas System, Taft Broadcasting,* both *supra, Viking Lithographers,* 184 NLRB 139 (1970); (6) that the Union was placed in trusteeship because of the inability of its officers

and business representatives to secure support from the employees employed in Northern Nevada, *Peoples Gas System, Taft Broadcasting, Viking Lithographers,* all *supra;* (7) that the Union conceded that only 20% of the employees involved were unionized and the Union was mounting a desperate organizing campaign, *Peoples Gas System, supra;* (8) that at the time Petitioners voluntarily recognized the Union by joining the multi-employer unit, the Union did not represent a majority of either Petitioners' employees; and (9) the substantial and material change from being a part of a multi-employer unit to a single unit employer, *Peoples Gas System, supra.*

As pointed out in *Zim's Foodliner, Inc. v. N.L.R.B.* (C.A. 7, 1974) 495 F.2d 1131, 1140:

> The Board has held that even informal employee statements to the employer regarding employee sentiment may provide a basis for good faith doubt. *Wallace Co.,* 174 NLRB 416 (1969).

In December 1974, when Petitioners challenged the Union's majority status, it relied on factors which were then Board law and which factors were individually and, at least, collectively sufficient to support their good faith doubt of the Union's continuing majority. As was so aptly put by the Court in the recent decision of *Marshall v. Baltimore & Ohio Railroad Co.* 461 F. Supp. 362 (D.C. Md., 1978): "individuals and businesses are entitled to rely on interpretations of existing law in arranging their activities." at 382.

**The Board's Derivative Presumption Is Contrary to Federal Law and Is Impermissible.**

The Board in the instant cases adopted its earlier fashioning a so-called derivative presumption, based on the errone-

ous rationale of the Administrative Law Judge whose brainchild it was:

> However, I believe that the presumption of continued majority flowing from the multi-employer contracts requires a *derivative presumption* of the Union's majority status which is applicable to each of the employer-members of the multiemployer bargaining unit separately. *Jim Kelley's Tahoe Nugget*, 227 NLRB 357, 363 (1976); *Nevada Lodge*, 227 NLRB 368, 374 (1976). [Emphasis supplied]

Board member Walther in attacking this novel and legally contrary approach, noting that in all of the years of the multi-employer relationship there never was any attempt to ascertain the majority sentiments of the employees, states:

> I take issue with my colleagues' conclusion that the presumption of majority status flowing from the contract in the multi-employer unit survives Respondent's timely withdrawal from that unit. By a process resembling alchemy, my colleagues have concocted the existence of majority status with only the thinnest support in legal reason and have, in complementary fashion, ignored valid distinctions between the presumptions applicable to single-employer and multiemployer units.
>
> • • •
>
> My colleagues argue that unless a majority of Respondent's employees in 1962 desired representation by Local 86 Respondent could not lawfully have forced representation on them by joining the multiemployer unit. They further note that Respondent cannot now attack Local 86's majority status among its own employees at the time of original recognition because of Section 10(b). From this my colleagues, citing cases which deal with the presumption of majority status in single-employer units, construct two entirely distinct and severable presumptions which in turn give birth to

> yet a third presumption. Starting with (1) a valid presumption of majority status in the multiemployer relationship, they turn back, and (2) interweave a second presumption of former majority status in the single-employer unit based upon the 10(b) prohibition against finding conduct which occurred years ago to be unlawful. From the interweaving of these two presumptions the majority manages to conceive yet a third presumption of current majority status in the single-employer unit which otherwise has no basis in fact or in logic. While I do believe that the Board can and should base violations of Section 8(a)(5) upon legitimate legal presumptions, a violation predicated upon a presumption raising not out of fact but out of the intermarriage of two other presumptions is, in my view, not a proper basis upon which to establish a violation. It must never be forgotten that an 8(a)(5) finding effectively prevents employees from exercising their right to a free choice in the selection of a collective-bargaining representative—a right these employees have never had an opportunity to exercise. *Jim Kelley's Tahoe Nugget,* 227 NLRB at 358; *Nevada Lodge,* 227 NLRB at 368.

Early on this Court held that a presumption cannot be built upon another presumption. *U.S. v. Ross,* 92 U.S. 281, 23 L.Ed. 707 (1876); *Manning v. Insurance Co.,* 100 U.S. 693, 698 (1880); *Looney v. Metropolitan R. Co.,* 200 U.S. 480, 26 S.Ct. 303, 306 (1906). Since then many Courts of Appeals have so similarly held. *Otis Elevator Company v. Yager,* 268 F.2d 137, 144 (C.A. 8, 1959); *Smith v. Fidelity Casualty Company of New York,* 261 F.2d 460, 462 (C.A. 5, 1958); *J. W. Ringrose v. W & J Sloane,* 266 F.2d 402, 404 (E.D. Pa., 1920), affd. 272 F. 445 (C.A. 3, 1921); *Smith v. Pennsylvania R. Co.,* 239 F. 103, 104 (C.A. 2, 1917); and *Hall v. Atchison, Topeka & Santa Fe Railway Company,* 349 F.Supp. 326, 330 (D. Kansas, 1972).

The Board here has gone even beyond basing a presumption upon a presumption. As Board member Walther points out, the Board has given "birth to yet a third presumption." 227 NLRB at 358 and 368. The Board's entire case and its conclusion, which the Court below followed, rest upon a presumption upon a presumption upon a presumption. The Board and the Court below treated its triple headed presumption as evidence. Without it, the Board had no basis for its conclusion.

In adopting the Board's derivative presumption approach, the Court below also ignored its own precedent. *Ariasi v. Orient Ins. Co.*, 50 F.2d 548, 552-554 (C.A. 9, 1931) in which the Court below cited and quoted copiously from authority that a presumption is not evidence and has no probative force. The Court below based its approval of the Board's hydra-headed presumption on policy considerations. Appendix p. 15. Policy considerations cannot override the law. The principal reason courts recognize a presumption is probability. *Ref-Chem Company v. N.L.R.B.*, 418 F.2d 127, 130-131 (C.A. 5, 1969; McCormick, Evidence, § 309, p. 641.

**The Board's Presumption Is One of Irrebuttable Force and Constitutes a Denial of Due Process.**

Petitioners, at the Board hearing, sought to introduce evidence which would demonstrate that the Union did not in fact represent a majority of their respective employees. The Board rejected this evidence and the Court summarily affirmed the Board on this issue but for different reasons. Said the Court:

> We affirm the Board's decision, but on a different basis. The Board cited *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 491 (2d Cir. 1975), for the proposition that union membership is irrelevant to the deter-

mination of a union's majority status. We do not agree. It is true that in a right-to-work state an employee may choose not to join a union, but, nevertheless, desire union representation. However, this observation does not render union membership irrelevant to a determination of whether an employee had a reasonable doubt of the union's majority or whether the union in fact lacked majority support. Union membership, even in a right-to-work state, is some indication of union support, through it may be only marginally relevant. *NLRB v. Tahoe Nugget,* 584 F.2d at 307, *NLRB v. Tahoe Nugget,* 584 F.2d at 307, *NLRB v. Vegas Vic, Inc.,* 546 F.2d 828 (9th Cir.), *cert. denied,* 434 U.S. 818, 54 L.Ed.2d 74, 98 S.Ct. 57 (1978), and *Terrell Machine Co. v. NLRB,* 427 F.2d 1088, 1090 (4th Cir.), *cert. denied,* 398 U.S. 929, 26 L.Ed.2d 91, 90 S.Ct. 1821 (1970), are not to the contrary.

The question asked by the resopndents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees. Although not dispositive, the question had some relevance to the issues of the Union's majority status and should have been allowed.

However, based upon the record before us, we cannot say that reversible error was committed. If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted.[5] Therefore, we find no error that would require a reversal. 5. See, *Barney's Club Incorp.,* 227 NLRB 414 (1976) (Board affirming administrative law judge's determination that the respondent failed to establish that the Union in fact did not represent a majority of the respondent's employees).

> Moreover, respondents did not materially rephrase the question after the administrative law judge's ruling and either ended the line of questioning or dropped the subject matter. Appendix p. 14

This reasoning is plainly wrong. As seen above the Board is bound to follow the "rules of evidence applicable to district courts" (29 U.S.C. 160(b) what the Board, with Court approval has done here, is to prevent Petitioner from submitting any evidence, in fact making the so-called rebuttable presumption conclusive in application and impermissably shifting the burden of proof to Petitioners.

Rule 301 of the Federal Rules of Evidence provides:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes upon a party against whom it is directed the burden of going forward with the evidence to rebut or meet the presumption, *but does not shift to such party the burden of proof in the sense of the risk of nonpersuation, which remains throughout the trial upon the party upon whom it was originally cast.* [West's 1979 ed. p. 210, (Emphasis added)]

In *Automated Business Systems v. N.L.R.B.*, 497 F.2d 262 (C.A. 6, 1974) denying enforcement of a Board bargaining order based upon the presumption of continuing majority status the Court held at 271:

> The Board would not permit the Company to introduce evidence regarding the number of cards filed in support of the decertification petition. *Thus the Board puts the burden of proof on the employer and then denies it the means of meeting its burden. We cannot accept this procedure.* (Emphasis added)

In the instant cases the Board and the Court below have denied the Petitioners access to evidence bearing on the

majority status and then imposed an insurmountable burden of proof on the Company.[5]

In defining administrative due process, this Court said in *Hormel v. Helvering,* 312 U.S. 552, 560, 61 S.Ct. 719, 723 (1941):

> Congress has entrusted the Board with exclusive authority to determine disputed facts. Under these circumstances we do not feel that petitioner should be foreclosed from all opportunity to offer evidence before the Board on this issue . . .

Despite this Court's mandate, Petitioners here were foreclosed by the Board's rejection of their proffered evidence and by the Board's application of its presumption, which made the presumption one of "irrebuttable force." This brings into play the issue of due process. The Court below, in an earlier decision, citing with approval this Court's opinion in *Hormel v. Helvering, supra,* stated in *N.L.R.B. v. Heyman,* 541 F.2d 796 (C.A. 9, 1976) at 801.[6]

> As a statute creating a presumption which operates to deny a fair opportunity to rebut would not afford due process . . . a Labor Board presumption to the same effect would also suffer shortcomings.

Also in *Heyman, supra,* the Court below held (at 801):

> . . . by coupling § 10(b) with the presumption the Labor Board would create an irrebuttable presumption having the substantive law effect that was rejected in *Local Lodge.*[7]

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5. The Company, under the Freedom of Information Act (5 U.S.C. § 551, *et seq.*) sought production of documents from the Board bearing on this. The Board refused. For a history of these attempts by the Company to obtain such information, see *Harvey's wagon Wheel, Inc. v. N.L.R.B.,* 550 F.2d 1139 (C.A. 9, 1976).

6. The Board's order was denied enforcement in that case.

7. The reference is to *Local Lodge No. 1424 v. N.L.R.B.,* 362 U.S. 411.

Here again, we have a conflict between panels of the Court below.

Moreover, the summary rejection of the proffered evidence by the Board and its application of its presumption here has the practical and actual effect of permitting the Board and the Union to stonewall any access to evidence relating to actual majority status. Thus, the Board has created an irrebuttable presumption.

This Court examined the matter of an irrebutable presumption, hence one of substantive law, in *Manhattan General E. Co. v. Commissioner of Int. Rev.*, 297 U.S. 129, 56 S.Ct. 397 (1936) and declared (297 U.S. at 134):

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress . . .

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinion of the Ninth Circuit.

Respectfully submitted,

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October 10, 1980.

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# Appendix

**No. .....**

*IN THE SUPREME COURT OF THE UNITED STATES*

OCTOBER TERM 1980

SILVER SPUR CASINO
*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

AND RELATED CASES.

## APPENDIX TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Richard H. Deane, Clerk, U.S. Court of Appeals

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*In the United States Court of Appeals*
*For the Ninth Circuit*

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| NATIONAL LABOR RELATIONS BOARD,<br>*Petitioner,*<br>and<br>HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL, RESTAURANT & BARTENDERS INTERNATIONAL UNION, AFL-CIO,<br>*Intervenor,*<br>vs.<br>SILVER SPUR CASINO,<br>*Respondent.* | No. 77-2311 |
| NATIONAL LABOR RELATIONS BOARD,<br>*Petitioner,*<br>and<br>HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86,<br>vs.<br>NEVADA CLUB, INC.,<br>*Respondent.* | No. 77-2939 |

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|---|---|
| NATIONAL LABOR RELATIONS BOARD,<br>*Petitioner,*<br>and<br>HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86,<br>*Intervenor,*<br>vs.<br>SPARKS NUGGET, INC., d/b/a JOHN ASCUAGA'S NUGGET,<br>*Respondent.* | No. 77-2954 |
| NATIONAL LABOR RELATIONS BOARD,<br>*Petitioner,*<br>and<br>HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86,<br>*Intervenor,*<br>vs.<br>BARNEY'S CLUB, INC.<br>*Respondent.* | No. 77-2658 |
| NATIONAL LABOR RELATIONS BOARD,<br>*Petitioner,*<br>and<br>HOTEL - MOTEL - RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86,<br>*Intervenor,*<br>vs.<br>FINALLY, INC., d/b/a THE PALACE CLUB,<br>*Respondent.* | No. 77-2938 |

## OPINION

On Application for Enforcement of an Order of the National Labor Relations Board

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

ANDERSON, Circuit Judge:

These consolidated cases are before this court pursuant to petitions filed by the National Labor Relations Board (Board) for enforcement of its Orders.[1] 29 U.S.C. § 160(e). The unifying issue is whether the employer-respondents violated sections 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to bargain with the Union. We shall consider this issue first, then deal with the other issues that pertain to the individual respondents.

### I. REFUSAL TO BARGAIN

#### A. *Background*

The respondents were all members of the Reno Employers Council (Council), a voluntary association of employers engaged in casino, restaurant and related businesses. The Council existed in part for the purpose of representing member-employers, in multi-employer units, in collective bargaining with labor organizations. The individual respondents joined the Council on different dates, but they all recognized the Union as the bargaining representative of a

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*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

1. We were advised by counsel for the respondents at oral argument that the Palace Club (No. 77-2938) had completely closed down, with no successor taking over that operation. The Board has not withdrawn its petition for enforcement of its order against the Palace Club. Without deciding whether the petition against the Palace Club has, in fact, been rendered moot, we deem this opinion to be moot as to the Palace Club if there is no employer upon whom the order may be enforced.

unit of their employees consisting of culinary workers, waiters and bartenders (employees). After being parties to successive multi-employer collective bargaining contracts with the Union,[2] respondents withdraw from their multi-employer bargaining units. Subsequent to their withdrawal from the multi-employer units, the respondents informed the Union that they would not negotiate new, individual collective bargaining agreements with the Union. Each respondent claimed to have a good faith doubt that the Union enjoyed the majority support of their respective employees.

Unfair labor practice charges were filed by the General Counsel of the Board against the respondents for their refusal to bargain with the Union. In each case the Board found that the respondents had committed unfair labor practices by withdrawing recognition of the Union as the collective bargaining representative of their employees and by refusing thereafter to bargain with the Union.[3] The Board ordered each respondent to cease and desist from the unfair labor practices and required each respondent to recognize and, upon request, bargain with the Union, and

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2. Sparks Nugget, Silver Spur, Nevada Club, and the Palace Club were in the same multi-employer bargaining unit and were signatories to the same 1972-1975 collective bargaining agreement with the Union as the Sierra Development Co., *NLRB v. Sierra Development Co.*, 604 F.2d 606 (9th Cir. 1979), and Carda Hotels, *NLRB v. Carda Hotels*, 604 F.2d 605 (9th Cir. 1979).

Barney's Club, on the other hand, was a signatory to the same 1971-1974 collective bargaining agreement with the Union as Tahoe Nugget, *NLRB v. Tahoe Nugget*, 584 F.2d 293 (9th Cir.), *cert. denied*, 442 U.S. 921, 61 L.Ed.2d 290, 99 S.Ct. 2847, *reh. denied*, .....U.S....., 62 L.Ed. 2d 122, 100 S.Ct. 186 (1979), Nevada Lodge, *NLRB v. Nevada Lodge*, *id.*, and Sahara-Tahoe, *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d 767 (9th Cir.), *cert. denied*, 442 U.S. 917, 61 L.Ed.2d 284, 99 S.Ct. 2837, *reh. denied*, .....US....., 62 L..Ed.2d 122, 100 S.Ct. 187.

3. *Silver Spur Casino*, 228 NLRB 1147 (1977); *Nevada Club, Inc.*, 229 NLRB 1186 (1977); *Sparks Nugget, Inc.*, 230 NLRB 275 (1977); *Barney's Club, Inc.*, 227 NLRB 414 (1977); *Finally, Inc. d/b/a Palace Club*, 229 NLRB 1128 (1977).

post certain notices. These cases are before us in part, for the enforcement of those orders.

We enforce the Board's orders on the issue of the respondents' refusal to bargain based upon the principles we have announced in *Tahoe Nugget, Sahara-Tahoe, Carda Hotel,* and *Sierra Development.*[4]

We deal with the issue in more depth in the following discussion to emphasize and, where necessary, to clarify portions of our previous opinions.

B. *Discussion*

In an unfair labor practice proceeding before the Board the burden is upon the General Counsel to establish by a preponderance of evidence that an unfair labor practice has occurred. *NLRB v. United Brotherhood of Carpenters & Joiners, etc.,* 531 F.2d 424, 426 (9th Cir. 1976). Where an employer has been charged with a violation of section 8(a)(5), refusal to bargain, the General Counsel must show that the union represented a majority of the employees in the unit at the time the employer refused to bargain with the union. *NLRB v. Tahoe Nugget, Inc.,* 584 F.2d at 297.

1. *Presumption of Majority Support*

The General Counsel is assisted by a presumption of majority union support in its attempt to meet its burden of proving that the employer unlawfully refused to bargain. "For a reasonable time, usually one year, after certification or voluntary recognition, majority support is irrebuttably presumed absent 'unusual circumstances.' After one year, the presumption becomes rebuttable." *Id.* Where sufficient proof to rebut the presumption is not presented by the employer, the presumption carries the General Counsel's burden of proof regarding the unfair labor practice charge. *Id.*

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4. Citations at footnote 2.

An employer may rebut the presumption by presenting sufficient evidence to demonstrate that the union was actually in the minority or that the employer had a good faith reasonable doubt of the union's majority support at the time of the refusal to bargain. *Id.* If the presumption is deemed rebutted, then the General Counsel must come forward with evidence to satisfy its burden of proof. *National Cash Register Co. v. NLRB,* 494 F.2d 189 (8th Cir. 1974).

The rebuttable presumption was applied by the Board in these cases. The Board determined that the respondents had not rebutted the presumption and found that they had committed unfair labor practices by refusing to bargain with the Union.

The respondents challenge that determination on the grounds that:

a. the presumption should not be applicable in a situation where employers have withdrawn from a multi-employer unit;

b. an employer's good faith belief is all that is required to rebut the presumption of majority support for the union;

c. the objective factors considered by the respondents were sufficient to rebut the presumption of majority support for the union.

d. the respondents were improperly precluded from showing that only a minority of employees supported the union.

e. the Board has made it impossible to rebut the presumption under the circumstances.

2. *Withdrawal from the Multi-Employer Unit*

The respondents contend that their withdrawal from the multi-employer bargaining unit should allow them to start anew in their relationship with the Union. That is, they wish to be viewed as single employers faced with the Union's initial claim for recognition.

In four previous cases[5] we have rejected that approach and have determined that the presumption survives an employer's withdrawal from the multi-employer bargaining unit.[6]

The bargaining history of the respondents shows that the same fact patterns have occurred. Thus, the conclusions reached in our previous cases apply equally as well here.

Moreover, our conclusion that the presumption survives the respondents' withdrawal from the multi-employer unit is a recognition that the presumption is also grounded in policy, not just probability. *NLRB v. Tahoe Nugget,* 584 F.2d at 302. 302. The most valued objective of the Act is industrial peace. Application of the presumption is a policy determination by the Board that industrial peace is more likely to be achieved by maintaining continuity in the bargaining structure.

We have not failed to observe that, in so deciding, the Board has favored continuity in the bargaining structure over the enhancement of employee free choice. However, the Board's decision, while not enhancing employee rights, does not adversely affect those rights. As always, the employees may exercise their freedom of choice by petitioning the Board for an election to choose whether to have another representative or to have no union representation at all. Adherence to the presumption does not stifle that right.

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5. *NLRB v. Tahoe Nugget; Sahara-Tahoe Corp. v. NLRB; NLRB v. Sierra Development Co.; NLRB v. Carda Hotels.*

6. In the formation of multi-employer units, it is an unfair labor practice for an individual employer to voluntarily recognize a union which does not enjoy majority support among that employer's employees. Thus when employers join a multi-employer unit and recognize the union, they are viewed as implicitly declaring that the majority of their employees favor the union. Subsequent withdrawal from the multi-employer unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor the union's representation. *NLRB v. Tahoe Nugget* at 303.

The presumption does make it more difficult for the respondents to rely on employee rights in refusing to bargain with their employees' designated representative. However, as we stated in *Tahoe Nugget*, at 301, "[I]n refusing to bargain because of an alleged decline in union adherents, the employer is acting as vicarious champion of its employees, a role no one has asked it to assume." See, *Brooks v. NLRB*, 348 U.S. 96, 103, 99 L.Ed. 125, 75 S.Ct. 176 (1954).

We thus believe that the Board has not abused its discretion in applying the presumption of majority union support here where employers have withdrawn from a multi-employer unit.

3. *Good Faith Reasonable Doubt*

An employer may withdraw recognition from an incumbent union because of its asserted good faith doubt of the union's support. Respondents contend that under *Celanese Corporation of America*, 95 NLRB 664 (1951), the employer's good faith belief that the union no longer had the majority support of its employees is all that is required. The respondents misread *Celanese* and misconceive the law.[7]

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7. Respondents correctly quoted a passage from *Celanese* which states that:

> "We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act on October 8 depends not on whether there was sufficient evidence to demonstrate that the Union in fact did not represent the majority of the employees but upon whether *the Employer in good faith believed* that the Union no longer represented the majority of the employees."

*Id.* at 671. However, the respondents failed to turn the page and read on as the Board, later in the opinion, went on to elaborate on the "good faith" criteria, and stated that:

> "By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in light of the totality of all the circumstances involved in a par-

An employer's good faith doubt of a union's majority status must be reasonable and supported by objective considerations. *NLRB v. Cornell of Cal., Inc.*, 577 F.2d 513, 515-516 (9th Cir. 1978); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *NLRB v. Tahoe Nugget*, 584 F.2d at 299. Respondents' contrary interpretation of the law is erroneous.

4. *Establishing Good Faith Reasonable Doubt*

Whether an employer has established a good faith reasonable doubt defense is a determination that must be made initially by the Board. The Board's decision will be upheld if it is supported by substantial evidence on the record as a whole. *Sahara-Tahoe Corp. v. NLRB*, 581 F.2d at 771.

In *Tahoe Nugget* and *Sahara-Tahoe* we stressed that the evidence presented to establish reasonable good faith doubt, individually or cumulatively, must unequivocally indicate that union support had declined to a minority. In those cases the Board found that the employers had not established the good faith doubt defense. Some evidence was presented of employee discontent, high employee turnover rates, low union membership, financial difficulties of the union, and a vigorous union membership drive. However, after evaluating the evidence, the Board determined that the evidence introduced by the respondents was not suffi-

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ticular case. But among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith in cases in which a union had been certified. *There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status* since its certification. And, secondly, the majority issue must not have been raised by the employer in a context of illegal anti-union activities, or other conduct by the employer aimed at causing disaffection from the union or indicating that in raising the majority issue the employer was merely seeking to gain time in which to undermine the union." (emphasis added)

*Id.* at 673.

cient to support a good faith reasonable doubt of the union's majority status. The evidence, standing alone or viewed in their totality, presented only an ambiguous inference of loss of majority support for the union. We enforced the Board's orders in those cases, determining that there was substantial evidence on the record as a whole to support the findings.

The evidence presented here does not differ materially from that considered by the Board and this court in *Tahoe Nugget* and *Sahara-Tahoe*. The Board in the present cases found that the respondents failed to establish the good faith reasonable doubt defense. Substantial evidence on the record as a whole supports the findings that the evidence, individually or cumulatively, presents only an equivocal inference of loss of majority support for the union.

5. *Actual Loss of Majority*

The presumption may also be rebutted when the employer brings forth sufficient evidence to demonstrate that the union did not, in fact, have the support of a majority of the employees in the unit. *Tahoe Nugget*, 584 F.2d at 297.

In *Barney's Club* the administrative law judge determined that the respondent's evidence fell short of demonstrating that the union did not have majority support. The Board affirmed. Reviewing the record as a whole, we uphold that decision.

In *Silver Spur, Sparks Nugget, Nevada Club* and *Finally, Inc.*, the respondents were restricted in their ability to question Board field examiner David Sargent and Union agent Howard Lawrence. They contend that the Board's actions erroneously prevented them from presenting their "actual loss of majority" defense and thus their cases should be remanded.

a. *Board Field Examiner Sargent*

Respondents, in their individual cases, subpoenaed Board field examiner Sargent. The administrative law judges quashed the subpoenas on the basis that Sargent's testimony would have been irrelevant *(Nevada Club; Finally, Inc.)*, or that 29 CFR § 102.118 prevented the subpoena from issuing to an agent of the Board without the Board's or General Counsel's consent *(Silver Spur, Sparks Nugget)*.

In *NLRB v. Heath Tec Division/San Francisco*, 566 F.2d 1367, 1371 (9th Cir.) *cert. denied*, 439 U.S. 832, 58 L.Ed.2d 127, 99 S.Ct. 110 (1978), we stated that in the absence of some valid evidentiary objection or privilege, 29 CFR § 102.118 cannot alone be the basis for the revocation of a properly issued subpoena. Thus the rulings of the administrative law judges in *Silver Spur* and *Sparks Nugget* were erroneous. However, the Board upheld the quashing of the subpoenas in all the cases, finding that a valid evidentiary privilege and a valid evidentiary objection existed. We agree.

The Board determined that there was an evidentiary privilege which protected the informal investigatory and trial preparatory process of administrative agencies, citing *Stephens Products Co., Inc. v. NLRB*, 515 F.2d 1373, 1376-1378 (8th Cir. 1975). Sargent apparently had spoken informally to the attorneys representing the respondents and had stated that the refusal to bargain charges would probably be dismissed. Later, however, formal complaints were filed, charging the respondents with refusing to bargain. Through Sargent respondents sought to establish that the initial determinations were actually made and they also sought the information which provided the basis for those determinations.

It is clear that the testimony and documents which the respondents sought were informal investigatory material and preliminary determinations. The qualified privilege of preserving the confidentiality of investigative files is applicable here. *NLRB v. Heath Tec,* 566 F.2d at 1370; *Stephens Products Co., Inc. v. NLRB,* 515 F.2d at 1376.

As in *Heath Tec,* and *Stephens Products Co., supra,* we conclude that the investigatory privilege concerning "informal deliberations of all prosecutorial agencies and branches of government" (*Stephens Products,* p. 1376, n.1) was properly invoked. Others were present during conversations with Sargent. They were not called as witnesses, however, and respondents have shown no reason why examining these people was not possible or would not have produced information similar to that which they sought from Sargent. Moreover, we have some doubt whether the information sought was sufficiently material to respondents' case to outweigh the privilege.

b. *Union Agent Lawrence*

The Board also sustained objections to the questioning of Union agent Lawrence regarding whether the Union had any records that would disclose it represented an actual majority of the unit employees of the respective respondents. The Board determined that the line of questioning was irrelvant because where union membership was voluntary, as in Nevada, such records provided no correlation to whether a majority of employees desired representation.

We affirm the Board's decision, but on a different basis. The Board cited *Retired Persons Pharmacy v. NLRB,* 519 F.2d 486, 491 (2d Cir. 1975), for the proposition that union membership is irrelevant to the determination of a union's majority status. We do not agree. It is true that in a right-to-work state an employee may choose not to join a union,

but, nevertheless, desire union representation. However, this observation does not render union membership irrelevant to a determination of whether an employee had a reasonable doubt of the union's majority or whether the union in fact lacked majority support. Union membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant. *NLRB v. Tahoe Nugget,* 584 F.2d at 307, *NLRB v. Vegas Vic, Inc.,* 546 F.2d 828 (9th Cir.), *cert. denied,* 434 U.S. 818, 54 L.Ed.2d 74, 98 S.Ct. 57 (1978), and *Terrell Machine Co. v. NLRB,* 427 F.2d 1088, 1090 (4th Cir.), *cert. denied,* 398 U.S. 929, 26 L.Ed.2d 91, 90 S.Ct. 1821 (1970), are not to the contrary.

The question asked by the respondents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees. Although not dispositive, the question had some relevance to the issues of the Union's majority status and should have been allowed.

However, based upon the record before us, we cannot say that reversible error was committed. If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted.[8] Therefore, we find no error that would require a reversal.

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8. See, *Barney's Club Incorp.*, 227 NLRB 414 (1976) (Board affirming administrative law judge's determination that the respondent failed to establish that the Union in fact did not represent a majority of the respondent's employees).

Moreover, respondents did not materially rephrase the question after the administrative law judge's ruling and either ended the line of questioning or dropped the subject matter.

*6. Impossibility of Rebutting the Presumption*

Finally, the respondents contend that the Board has in effect created a presumption that is impossible to rebut. Respondents argue that the burden is placed upon them to rebut the presumption, but they are denied the means to do so. Further, the respondents contend that the Board has demanded more evidence than should be required to rebut the presumption.

We find no merit to the respondents' first argument. As we discussed in the previous section, the Board's rulings regarding Board field examiner Sargent and union agent Lawrence did not improperly deny the respondents access to information.

As to the respondents' second argument, we recognize the force of their contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases.[9] Accepting, argu-

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9. Respondents have cited cases from various circuits where the presumption of majority support was deemed rebutted. See, *e.g.*, *Ingress-Plastene, Inc. v. NLRB*, 430 F.2d 542 (7th Cir. 1970); *Star Manufacturing Co. v. NLRB*, 536 F.2d 1192 (7th Cir. 1976); *Lodges 1746 & 743, Int'l Ass'n of Mach. & Aero. Workers v. NLRB*, 416 F.2d 809 (D.C. Cir.), *cert. denied*, 396 U.S. 1058, 24 L.Ed.2d 752, 90 S.Ct. 751 (1970); but see, *Teamsters Local U. 769 v. NLRB*, 532 F.2d 1385 (D.C. Cir. 1976); *National Cash Register Co. v. NLRB*, 494 F.2d 189 (8th Cir. 1974); *National Car Rental System v. NLRB*, 594 F.2d 1203 (8th Cir. 1979); *NLRB v. Alvin J. Bart & Co., Inc.*, 598 F.2d 1267 (2d Cir. 1979); *W & W Steel Co. v. NLRB*, 599 F.2d 934 (10th Cir. 1979); *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974; *NLRB v. Nu Southern Dyeing & Finishing, Inc.*, 444 F.2d 11 (4th Cir. 1971); *NLRB v. Randall-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978). Of these cases cited by respondents, we believe only *W & W Steel Co. v. NLRB*, *Star Manufacturing Co. v. NLRB*,

endo, that a conflict exists on this issue, we nevertheless adhere to the views expressed in this and our previous opinions. While we find that there is substantial evidence on the record as a whole to support the Board's decision in each of these cases, we also believe that the policies and goals of the Act will be best served by the enforcement of the Board's orders on the respondents' refusal to bargain.

## II. *NO SOLICITATION RULE*

### A. *Background*

In *Barney's Club* and *Sparks Nugget* the employers promulgated no-solicitation rules which, among other things, prohibited employees from soliciting on company premises after their shifts had been completed. The Board determined in both cases that the employers had violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by maintaining the rules. We agree with the Board that the rules promulgated by these respondents were violative of Section 8(a)(1). However, we believe the Board's orders were too broad. We thus enforce the Board's order as modified herein.

### B. *Discussion*

#### 1. *Applicable Law*

The freedom to communicate is essential to the effective exercise of organizational rights granted to employees under Section 7 of the Act, 29 U.S.C. § 157. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543, 33 L.Ed.2d 122, 92 S.Ct. 2238 (1972); *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491, 57 L.Ed.2d 370, 98 S.Ct. 2463 (1978). However, the

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and *Ingress-Plastene, Inc. v. NLRB*, present factual situations in which other circuits may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases.

right of employees to solicit or distribute materials must be balanced against an employer's right to maintain discipline in its establishment. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 797-798, 89 L.Ed. 1372, 65 S.Ct. 982 (1945). Thus, certain rules have been developed with respect to the exercise of employee organizational rights under Section 7. Since "working time is for work," a rule prohibiting employee solicitation and distribution of literature during work time is presumed to be valid. On the other hand, "the time outside work, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint," even though he is on company property. Therefore, a rule prohibiting employee solicitation or distribution of literature during nonworking time in nonwork areas is presumptively invalid unless special circumstances warrant the adoption of the rule. *Republic Aviation,* at 802 n. 10; *NLRB v. Magnavox Co.,* 415 U.S. 322, 325, 39 L.Ed.2d 358, 94 S.Ct. 1099, *reh. denied,* 416 U.S. 952, 40 L.Ed.2d 302, 94 S.Ct. 1962 (1974).

The finding of the requisite "special circumstances" or an exception to the presumption of invalidity may arise where the business is one dealing in direct selling and service to customers. The Board has approved employer rules which prohibit all employee solicitations, even during an employee's nonworking time, in the selling areas of stores and restaurants on the theory that such activity may tend to drive away customers. *May Department Stores Co., d/b/a Famous-Barr Co.,* 59 N.L.R.B. 976, 981, *enf'd as modified,* 154 F.2d 533 (8th Cir.), *cert. denied,* 329 U.S. 725, 91 L.Ed. 627, 67 S.Ct. 72 (1946); *Goldblatt Bros., Inc.,* 77 N.L.R.B. 1262, 1264 (1948); *Marriott Corp., Children's Inn*), 223 N.L.R.B. 978 (1978); *see also Beth Israel Hospital* at 493. In allowing the broader no-solicitation rules, the goal has

been to strike the appropriate balance between organizational rights of employees and the rights of employers to control their businesses. Thus, as the Supreme Court stated in *Beth Israel Hospital* at 506:

> "In the retail marketing and restaurant industries, the primary purpose of the operation is to serve customers, and this is done on the selling floor of a store or in the dining area of a restaurant. Employee solicitation in these areas, if disruptive, necessarily would directly and substantially interfere with the employer's business. On the other hand, it would be an unusual store or restaurant which did not have stockrooms, kitchens, and other nonpublic areas, and in those areas employees solicitation of nonworking employees must be permitted. In that context, the Board concluded that, on balance, employees' organizational interests do not outweigh the employer's interests in prohibiting solicitation on the selling floor."

However, the fact that an establishment is a restaurant or a store does not automatically allow it to impose a broad no-solicitation rule. In *Beth Israel Hospital* the question was whether a hospital cafeteria could prohibit employee solicitations in its dining room. The Supreme Court noted that the primary purpose of the hospital was patient care and therapy. The hospital cafeteria functioned more as an employee-service area than a patient care area, as 77% of its patrons were employees. Thus the Court stated that "when the primary function and use of the cafeteria, the availability of alternative areas of the [hospital] facility in which § 7 rights effectively could be exercised, and the remoteness of interference with patient care are considered," it was appropriate for the Board to strike the balance in favor of § 7 rights in the hospital cafeteria. *Id.* at 506. Therefore, the relationship of the restaurant or store to the employer's business enterprise must also be

considered in striking the appropriate balance between employee and employer rights.

Even though an employer's business enterprise justifies a more restrictive no-solicitation rule, that rule may be over-broad and thus invalid. *Marriott Corp.* at 978. In *Marriott Corp.* the Board stated that the employer could prohibit solicitation, even during employee break and lunch periods, in areas where customers were likely to be present. However, the Board determined that the employer's rule was not limited to the customer or sales area of the restaurant; thus the rule was declared to be over-broad and invalid on its face.

2. *Present Cases*

In *Barney's Club* and *Sparks Nugget* the respondent employers are engaged primarily in the direct service of customers through their gambling, restaurant and bar facilities. There is no contention that any of these facilities serve primarily as employee-service areas. Thus, under the previously-discussed precedents, the respondents could promulgate no-solicitation rules which prohibited employees from engaging in solicitation or distribution of materials in areas open to the public even during nonworking periods.

We agree with the Board, though, that the rules promulgated by the respondents were overly broad and thus invalid. However, the Board's orders in these cases were themselves overly broad. The orders stated that the respondents must cease and desist from:

> "maintaining any rule or regulation prohibiting its employees from soliciting on its premises after their shifts have been completed unless such prohibition is demonstrably necessary to maintain production, discipline or security."

The orders go too far. Since the respondents could prohibit their employees from soliciting during nonworking hours in public areas of their premises, we modify the Board's order to read that the respondents must cease and desist from:

> "maintaining any rule or regulation prohibiting its employees from soliciting on its premises during nonworking hours in nonpublic areas of its premises."

We enforce the Board's order on this issue as modified.

## III. *UNILATERAL CHANGES*

As long as its bargaining obligation is not extinguished, an employer has a continuing duty to bargain over mandatory subjects of bargaining without instituting unilateral changes, even after the expiration of the prior agreement. *NLRB v. Sky Wolf Sales,* 470 F.2d 827 (9th Cir. 1972). See, *Allied Chemical & Alkali Workers v. Pittsburg Plate Glass Co.,* 404 U.S. 157, 30 L.Ed.2d 341, 92 S.Ct. 383 (1971). Mandatory subjects of collective bargaining include insurance benefits and grievance procedures for employees. 404 U.S. at 159; The Developing Labor Law, 404 (1971).

In *Sparks Nugget,* the Board found that the employer committed unfair labor practices in violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 158(a)(5) and (1), by unilaterally implementing a new grievance procedure and a new insurance program.

The respondent's sole argument to justify the unilateral change in the grievance procedure was that the change was made after its obligation to bargain had terminated. We have already ruled in Section I that there was a continuing duty to bargain. The respondent's unilateral change of the

grievance procedures was an unfair labor practice. *NLRB v. United Nuclear Corp.*, 381 F.2d 972 (10th Cir. 1967). We enforce the Board's order on this issue.

There appears to be little question that the new insurance plan was implemented by the respondent without consultation or negotiation with the Union over the matter. The respondent was found to have committed an unfair labor practice. The administrative law judge, however, limited the proposed remedy to requiring the respondent to "cease and desist from unilaterally altering or modifying the terms and conditions of a collective bargaining agreement it may have with the Union" (R. 151) because he found that the Union had condoned the respondent's actions.[10] The decision and order were affirmed by the Board. We cannot agree that an unfair labor practice can be found as the acts were condoned.

Condonation takes place when the injured party demonstrates a willingness to forgive the improper conduct and "wipe the slate clean." *Confectionery & Tobacco Drivers & Warehousemen's Union v. NLRB*, 312 F.2d 108, 113 (2d Cir. 1963); *Cast Optics Corp. v. NLRB*, 458 F.2d 398, 404 (3d Cir.) *cert. denied*, 409 U.S. 850, 34 L.Ed.2d 92, 93 S.Ct. 58 (1972). In *Confectionery & Tobacco Drivers*, employees had engaged in a walkout in violation of their contractual no-strike clause. The court there stated, however, that,

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10. The administrative law judge stated:

"It further appears from the failure of the Union to lodge any protest with regard to the unilateral implementation of the program, the position taken by the Union as to compliance with Section 3 of article XVIII, and the attempt, disclosed in McKinlay's testimony, to obtain benefits for an employee under the program, that the Union condoned the Respondent's failure to consult with it prior to its implementation . . . ." (R. 151)

The Board affirmed the administrative law judge's findings.

"[A]fter a condonation the employer may not rely upon prior unprotected activities of employees to deny reinstatement to, or otherwise to discriminate against them." 312 F.2d at 113.

We agree with the Board that condonation took place with regard to the implementation of the new insurance plan. The Union's condonation of the unilateral action, however, "wipes the slate clean." The Board erred in its application of the law on condonation; there was no unfair labor practice upon which to base the charge. We, therefore, deny enforcement of the cease and desist order.

## IV. *REFUSING TO PROVIDE A COPY OF THE NEW INSURANCE PLAN*

There is a duty on the part of the employer to supply the Union, upon request, with sufficient information to enable the Union to effectively carry out its collective bargaining duties. *San Diego Newspaper Guild, etc. v. NLRB*, 548 F.2d 863, 866 (9th Cir. 1977). The information however, must be relevant to a legitimate union collective bargaining need. *Id.* 548 F.2d at 867. Failure of the employer to comply with a request for relevant information is a violation of Sections 8(a)(5) and (1) of the Act, 29 U.S.C. §§ 1158(a)(5) and (1).

The administrative law judge found, and the Board summarily affirmed, that the respondent committed an unfair labor practice in violation of Sections 8(a)(5) and (1) by its refusal to furnish the Union with a requested copy of the new insurance program. Since there was a continuing duty to bargain, the refusal to comply with the request was found to inhibit the Union in meaningfully bargaining with the respondent. We enforce the Board's order on this issue; substantial evidence on the record as a whole supports the Board's determination.

## V. *INTERROGATION OF EMPLOYEE LAUNIUS*

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), provides that it shall be an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of their rights guaranteed under Section 7 of the Act. The questioning of employees by the employer regarding their concerted activities can be a violation of Section 8(a)(1) where it interferes with Section 7 rights. *Amalgamated Meat Cutters, etc., Local No. 364 v. NLRB,* 435 F.2d 668 (9th Cir. 1970). However, employer questioning of employees regarding their concerted activities is not per se unlawful. *Penasquitos Village, Inc. v. NLRB,* 565 F.2d 1074, 1080 (9th Cir. 1977). "The test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their protected rights." *Id.* at 1080. To be an unfair labor practice, interrogation "must be associated with express or implied treats or promises, or form part of an overall pattern tending to restrain or coerce employees with regard to their protected activities. *Amalgamated Meat Cutters,* 435 F.2d at 669.

The Board affirmed the administrative law judge's finding that the employer in *Sparks Nugget* unlawfully interrogated employee Gail Launius in violation of Section 8(a)(1). The administrative law judge's determination was based upon its finding that the totality of the circumstances indicated animosity towards the employee for her union activity and that a threat of discharge for any "further" violation of the company's no solicitation rule was made.

This issue presents a close question. However, the inferences drawn from the facts by the administrative law judge and affirmed by the Board are reasonable. Finding substantial evidence on the record as a whole, we enforce the Board's order on this issue.

## VI. *REPRIMAND OF EMPLOYEE DYER*

An employer violates Sections 8(a)(3) and (1) of the Act, 29 U.S.C. §§ 158(a)(3) and (1) by discriminating to encourage or discourage membership in any labor organization. *Radio Officers' Union v. NLRB,* 347 U.S. 17, 98 L.Ed. 455, 74 S.Ct. 323 (1954). Discrimination violative of Sections 8(a)(3) and (1) may be found where an employer disciplines an employee because that employee has engaged in or is suspected of engaging in union activities. *NLRB v. Bin-Dictator Co.,* 356 F.2d 210, 214-215 (6th Cir. 1966).

The Board found that employee John Dyer was reprimanded by the employer in *Sparks Nugget* because he was suspected of engaging in union activities and the employer sought to deter him from such activities. (R. 146) While different inferences may be drawn from the facts, the inferences drawn by the Board were reasonable and supported by substantial evidence on the record as a whole. We enforce the Board's order on this issue.

## *CONCLUSION*

Summarizing our disposition of the various issues considered:

1. We enforce the Board's orders with regard to the respondents' refusal to bargain (Section I);

2. The Board's orders concerning the respondents' no solicitation rules in *Barney's Club* and *Sparks Nugget* are enforced as modified (Section II);

3. The Board's order regarding the unilateral changes made in *Sparks Nugget* is enforced as to the unilateral implementation of the new grievance procedure, but denied as to the unilateral implementation of the insurance program (Section III);

4. The respondent in *Sparks Nugget* committed an unfair labor practice in refusing to provide the Union

with a copy of the new insurance program; therefore, we enforce the Board's order on that issue (Section IV);

5. The interrogation of Sparks Nugget employee Launius and the reprimand of employee Dyer were unfair labor practices. Thus, we enforce the Board's order on those issues (Sections V & VI).

IT IS SO ORDERED.

Received Richard H. Deane
Clerk, U.S. Court of Appeals
JUN 9 1980
Filed 7-14-80 OS
Docketed 6-9-80 DZ

Received AUG 8 1980
Severson, Werson, Berke & Melchior

*United States Court of Appeals*
*For the Ninth Circuit*

No. 77-2311

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86
*Intervenor,*

v.

SILVER SPUR CASINO.,
*Respondent.*

JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against the Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns on April 4, 1977. The Court heard arguments of respective counsel on December 12, 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively in good faith concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees employed by Silver Spur Casino in its bar and culinary operations at its Reno, Ne-

*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

vada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the National Labor Relations Act.

2. Take the following affirmative action:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Reno, Nevada, facility copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 20, of the National Labor Relations Board (San Francisco, California) after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecuitve days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps have been taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

JUDGES:

ANTHONY M. KENNEDY
ANTHONY M. KENNEDY, CJ

J. BLAINE ANDERSON
J. BLAINE ANDERSON, CJ

EDWARD J. SCHWARTZ
EDWARD J. SCHWARTZ, DJ

/s/ RICHARD H. DEANE
RICHARD H. DEANE
*Clerk*

A TRUE COPY

ATTEST:

RICHARD H. DEANE
*Clerk*

A TRUE COPY
ATTEST 7 - AUG. 1980

Richard H. Deane
Clerk of Court

by: Oscar Tagle
Deputy Clerk

Clerk, U.S. Court of Appeals
JUN 9 1980
Filed 7-14-80 OS
Docketed 6-9-80 DZ

Received AUG 8 1980
Severson, Werson, Berke & Melchior

*United States Court of Appeals*
*For the Ninth Circuit*

No. 77-2939

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86
*Intervenor,*

v.

NEVADA CLUB, INC.,
*Respondent.*

## JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against the Respondent, Nevada Club, Inc., Reno, Nevada, its officers, agents, successors, and assigns on June 3, 1977. The Court heard argument of respective counsel on December 12, 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Nevada Club, Inc., Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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*The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, (hereinafter called the Union) as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below; with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached Notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 20 of the National Labor Relations Board (San Francisco, California) after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

JUDGES:

ANTHONY M. KENNEDY
ANTHONY M. KENNEDY, CJ

J. BLAINE ANDERSON
J. BLAINE ANDERSON, CJ

EDWARD J. SCHWARTZ
EDWARD J. SCHWARTZ, DJ

/s/ RICHARD H. DEANE
RICHARD H. DEANE
*Clerk*

A TRUE COPY

ATTEST:

RICHARD H. DEANE
*Clerk*

A TRUE COPY
ATTEST 7 - AUG. 1980
Richard H. Deane
Clerk of Court
by: Oscar Tagle
Deputy Clerk

Received Richard H. Deane
Clerk, U.S. Court of Appeals
JUN 9 1980
Filed 7-14-80 OS
Docketed 6-9-80 DZ

Received AUG 8 1980
Severson, Werson, Berke & Melchior

*United States Court of Appeals*
*For the Ninth Circuit*

No. 77-2938

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES
& BARTENDERS UNION, LOCAL 86
*Intervenor,*

v.

FINALLY, INC., d/b/a THE PALACE CLUB,
*Respondent.*

JUDGMENT

Before: KENNEDY and ANDERSON, Circuit Judges, and SCHWARTZ,* District Judge.

---

* The Honorable Edward J. Schwartz, Chief United States District Judge for the Southern District of California, sitting by designation.

THIS CAUSE came to be heard upon an application of the National Labor Relations Board for the enforcement of an order issued by it against the Respondent, Finally, Inc., d/b/a Palace Club, Reno, Nevada, its officers, agents, successors, and assigns on June 2, 1977. The Court heard argument of respective counsel on December 12 1979, and has considered the briefs and transcript of record filed in this cause. On May 27, 1980, the Court, being fully advised of the premises, handed down its opinion granting enforcement of the Board's Order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Respondent, Finally, Inc., d/b/a Palace Club, Reno, Nevada, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, (hereinafter called the Union) as the exclusive bargaining representative of the employees in the apropriate bargaining unit described below, with regard to wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act (hereinafter called the Act).

2. Take the following affirmative action which the Board has found necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purpose of collective bargaining is:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached notice marked "Appendix." Copies of the notice on forms provided by the Regional Director for Region 20 of the National Labor Relations Board (San Francisco, California) after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by other material.

(c) Notify the aforesaid Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

Endorsed, Judgment Filed and Entered

SO ORDERED:

/s/ RICHARD H. DEANE
RICHARD H. DEANE
*Clerk*

JUDGES:

ANTHONY M. KENNEDY
ANTHONY M. KENNEDY, CJ

J. BLAINE ANDERSON
J. BLAINE ANDERSON, CJ

EDWARD J. SCHWARTZ
EDWARD J. SCHWARTZ, DJ

A TRUE COPY

ATTEST:

RICHARD H. DEANE
*Clerk*

A TRUE COPY
ATTEST 7-AUG 1980
Richard H. Deane
Clerk of Court
By: Oscar Tagle
Deputy Clerk

Supreme Court, U.S.
FILED
OCT 11 1980
MICHAEL RODAK, JR., CLERK

No. 80-660

# In the Supreme Court of the United States

OCTOBER TERM 1980

SILVER SPUR CASINO,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

AND RELATED CASES.

## Supplemental Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Received Apr 6 1977
Severson, Werson, Berke & Melchior

*United States of America*
*Before the National Labor Relations Board*

Cases 20—CA—9803—3,
20—CA—9853—3,
20—CA—9869—3,
20—CA—9897—3, and
20—CA—9905—3

SILVER SPUR CASINO

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

## DECISION AND ORDER

On December 23, 1976, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed briefs in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

decided to affirm the rulings,[1] findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order.

---

1. In support of its alternative defense that the Union did not, in fact, enjoy majority status on December 20 ,1974, when recognition was withdrawn, Respondent asserts in its brief that it should have been permitted to adduce testimony from Business Representative Howard Lawrence regarding the existence of union business records demonstrating (if such could) that as of that date the Union represented a majority of the employees employed by Respondent. We find no merit in this contention, as it is well established that particularly where, as here, union membership was voluntary, such records are irrelevant to a determination of whether a majority of employees desired union representation. *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 491 (C.A. 2, 1975).

In further support of its alternative defense, Respondent asserts in its brief that it should have been permitted to adduce testimony from Field Examiner David Sargent of Region 20 of the National Labor Relations Board concerning his alleged review of the Union's business records. Respondent contended at the hearing that it also sought to question Field Examiner Sargent with respect to an alleged preliminary determination by the Regional Office that Respondent was considered not to have violated the National Labor Relations Act. At the hearing, the Administrative Law Judge revoked the subpena directed to Field Examiner Sargent. We are satisfied that the testimony sought by Respondent fell within the "limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB," *Stephens Produce Co., Inc. v. N.L.R.B.*, 515 F.2d 1373, 1376 (C.A. 8, 1975) and that Respondent has shown no substantial reason to disregard it. Indeed, union business records are wholly irrelevant to the issue raised by Respondent's defense, *Retired Persons, supra,* and any information the Regional Office may have given to Respondent concerning an anticipated dismissal of the instant unfair labor practice charge is irrelevant to any issue in this proceeding because the General Counsel did, in fact, issue a complaint. Accordingly, we conclude that the Administrative Law Judge properly revoked the subpena of Field Examiner Sargent.

2. The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

3. Respondent's request for oral argument is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. April 4, 1977

.....

Betty Southard Murphy, *Chairman*

.....

John H. Fanning, *Member*

.....

John A. Penello, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

*United States of America*
*Before the National Labor Relations Board*
*Division of Judges*
*Branch Office*
*San Francisco, California*

Cases 20—CA—9803—3,
20—CA—9853—3,
20—CA—9869—3,
20—CA—9897—3, and
20—CA—9905—3

SILVER SPUR CASINO
and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

*Patricia S. Radez, Atty.*, San Francisco, Calif. for the General Counsel.
*Geoffrey V. White, Atty.*, San Francisco, Calif. for the Charging Party.
*Howard Lawrence, Reno, Nev.* for the Charging Party.
*William W. Wertz, Atty.*, San Francisco, Calif. for the Respondent.

## DECISION

RICHARD J. BOYCE, Administrative Law Judge:

### I. *Statement of the Case*

This matter was tried before me in Reno, Nevada, on June 8 and 9, 1976.

The five charges herein, filed and amended on various dates[1] by Hotel-Motel-Restaurant Employees & Bartenders

1. The charge in 20-CA-9803 was filed on December 16, 1974, and amended seven times, most recently on June 2, 1975. That in 20-CA-9853 was filed on January 13, 1975, and amended on June 17, 1975. That in 20-CA-9869 was filed on January 16, 1975, and amended on June 17, 1975. That in 20-CA-9897 was filed on January 23, 1975, and amended on June 17, 1975. That in 20-CA-9905 was filed on January 27, 1975, and amended on May 7 and June 25, 1975.

Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO (herein called the Union), allege violations of the National Labor Relations Act by Silver Spur Casino (herein called Respondent) and other employers not involved in this trial. To distinguish this trial from those under the same docket numbers involving other employers, a suffix (-3) has been added to the case numbers as reflected above in the caption.

The complaint on which this matter was tried issued on October 3, 1975, was amended during the trial, and alleges that Respondent violated Section 8(a)(5) and (1) of the Act.

The parties were permitted at the trial to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Briefs were filed for the General Counsel, for Respondent, and for the Charging Party.

## II. *Issue*

The issue is whether Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union on and after December 15, 1974.

## III. *Jurisdiction*

Respondent operates a restaurant, bar, and casino in Reno, Nevada. It annually receives revenues exceeding $500,000, and purchases and causes to be delivered across state lines goods and materials valued in excess of $10,000.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6) and (7) of the Act.[2]

---

2. Respondent's argument is rejected that Board jurisdiction over it should not be asserted because of the extensive state regulation of the gaming industry in Nevada. *Nevada Lodge*, 227 NLRB No. 73 (1976); *Grand Resorts, Inc.*, 221 NLRB No. 121 (1975); *El Dorado, Inc.*, 151 NLRB 579 (1965).

## IV. *Labor Organization*

The Union is a labor organization within Section 2(5) of the Act.

## V. *The Alleged Unfair Labor Practice*

### A. *Facts*

Respondent opened for business on about July 1, 1968. Later that year, it became a member of the Reno Employers Council (herein called the Council). By joining, Respondent became subject to the then existing multiemployer-unit labor contract between the Council and the Union covering the bar and culinary employees of the Council's several employer-members. Respondent's membership in the Council made it subject to later contracts between the Council and the Union, as well, the most recent running from February 16, 1972, through February 15, 1975. Respondent had 90 to 100 bar and culinary employees at the times now in question.

By letters dated November 15, 1974, Al Bramlet, an official of the Union, informed the Council and its members, including Respondent, of the Union's desire "to change and modify for the period following February 16, 1975, the terms and conditions of our current Collective Bargaining Agreement with you." The letters requested that the employers "communicate with the undersigned for the purpose of arranging for collective bargaining negotiations."

By letter to the Council dated December 11, 1974, copy to the Union, Respondent stated:

> This is to notify you that the Silver Spur Casino is fully withdrawing from the Reno Employers Council on all matters pertaining to collective bargaining or labor relations matters.

And, by letter to the Union dated December 12, Respondent stated in relevant part:

> This is to . . . notify you that in accordance with the existing Reno/Sparks collective bargaining agreement, we desire to and hereby do terminate said agreement effective as of the end of the term thereof.

The Union received a similar letter of the same date from the Council.

By letter to Respondent dated December 13, the Union's attorney, Philip Bowe, wrote:

> As you know, our office represents Hotel-Motel-Restaurant Employees and Bartenders Local 86.
> Although a contract reopener letter concerning your bar and restaurant agreement was mailed to you on November 15, 1974, with a request for you to contact Mr. Bramlet to arrange for negotiations, no response has been received to date from you or from your Association representative.
> Unless you contact Mr. Bramlet immediately, refusal to bargain charges will be filed with the National Labor Relations Board without further notice.

Bowe sent similar letters of the same date to other recently withdrawn members of the Council, and to the Council itself.

Attorney Nathan Berke, representing Respondent among others, replied to Bowe's letter with this to the Union, dated December 20:

> This is in reply to the recent letter from your attorney to the following whom we represent:
>
> Nevada Club
> Palace Club
> Ponderosa
> Reno Nugget
> Silver Spur
> Sparks Nugget

As you are aware from letters recently sent you from each of them and from the Reno Employers Council, each of our clients has timely withdrawn from the multi-employer group and each is handling its own collective bargaining. The bargaining unit, therefore, is entirely different as far as each of our clients is concerned.

Although it is not clear from your attorney's letters as to what unit you are claiming or whether you claim to represent a majority of each of our clients' employees in an appropriate unit, we will treat his letter as though he has on your behalf requested bargaining in a unit consisting of culinary and bartender employees in each of the named establishments.

Pursuant to instructions from each of our clients, on behalf of each of them individually, we hereby inform you that each individually has a genuine doubt that your Local continues to represent an uncoerced majority of their respective employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our clients individually will at such time fulfill whatever legal obligation they may individually then have.

Should your Local file a petition with the Board for an election, each of our clients, individually, will cooperate looking toward an election under the Labor Management Relations Act, 1947, as amended and the Board's applicable Rules and Regulations.

Respondent at all times since has refused to recognize the Union.

James Parker, Respondent's general manager, testified that Respondent's refusal to recognize the Union was based upon his belief that the Union did not represent a majority of Respondent's bar and culinary employees in late 1974.

Parker continued that his belief derived from several factors:

1. Newspaper articles. Parker cited two articles appearing in Reno papers, one on August 20, 1974, the other on August 22. The August 20 article quoted from a piece written by Bramlet for the Union's monthly magazine in which he deplored working conditions in the bar and culinary industry in the Reno area. The August 22 article, after stating that the Union was engaged in "a full-scale campaign to organize Reno and Lake Tahoe food and beverage workers," also quoted Bramlet as deploring working conditions in the area and as saying that "Las Vegas is 98 per cent unionized while Reno-Tahoe is less than 20 per cent." The August 22 article closed with this paragraph:

> He [Bramlet] said, however, union strength is growing fast in the north and that the real test will come in November when the northern local contract expires at Lake Tahoe. He said the Reno contracts expire in February and that, by then, he hopes to have many more culinary workers in the area unionized.

Neither article mentioned Respondent, or any other employer, by name. Both mentioned that Bramlet had been appointed "international trustee" of the Union.

2. Employee turnover. Parker testified that the newspaper articles inspired him to review Respondent's payroll records, to ascertain the extent of employee turnover. He stated that a comparison of the August payrolls for 1972 and 1974 disclosed a turnover in the two years of over 80 percent. He conceded on cross-examination that this rate was representative of Respondent's experience from its inception in 1968 through 1974.

3. Union grievances. Parker testified that his belief also was influenced by the Union's failure to file any grievances in 1974, and only three or four during the life of the 1972-75 contract. The record does not disclose the extent to which Respondent may have engaged in grievable conduct.

4. Reported employee dissatisfaction with the Union. Parker testified that Bar Manager Robert Wills and Restaurant Manager Samuel GeeGee informed him of employee dissatisfaction with the Union. Elaborating, Parker stated that Wills reported to him in late August 1974 that the bar employees were "very dissatisfied" with the Union and opined that the Union would lose should there be an election. Parker added that Wills later expressed himself to this effect "approximately once a week." Parker testified that GeeGee likewise informed him in late August of employee disaffection with the Union, predicting that it could not win an election; and that GeeGee thereafter made similar pronouncements "on the average of once or twice a week" until December.

Wills testified that he first discussed the Union with Parker in early December, not August as Parker would have it, and that they "probably" had six or eight such conversations in all, none of which Wills could reconstruct in any but the sparest of detail. In the first conversation, according to Wills, Parker asked him how the bar employees "felt about the Union," and he replied that he did not "think they were too happy." In a later conversation, Wills assertedly identified by name six bartenders and one cocktail waitress who had voiced displeasure with the Union. And in one or the other of the several conversations, according to Wills, he told Parker that, "if we had a vote, . . . there would be no union."

There were 22 bar employees at the time—12 bartenders, 4 barboys, and 6 cocktail waitresses. Other than that he "remember[ed] several of the bartenders, and conversations with them," Wills' testimony contained nothing of the substance of comments by bar personnel that allegedly underlay his observations to Parker.

GeeGee testified that he first discussed the Union with Parker in November, not August, and that they had a total of "between six and ten" such conversations, of which he could remember only one. In that one, according to GeeGee, he told Parker of an incident involving a union agent and Waitress Lois Webb[3] and asked Parker "why the waitresses and staff were coming to me, instead of going to the [Union] business agent" with their questions. GeeGee recalled Parker as replying that he "would get some legal advice." GeeGee initially testified that there were "quite a few" occasions in which restaurant employees had expressed antiunion sentiments to him—"maybe six to eight"—before his first conversation with Parker. He later revised this, asserting that "about 60 of my employees came to me" before he reported to Parker that the restaurant employees "did not want to be represented by Local 86."

Pressed on cross-examination to name the employees who had evinced displeasure with the Union, GeeGee offered 13 names. Pressed to disclose what the 13 had said showing antiunion feeling, GeeGee could provide no content as to two, said that another three asked him if they had to join the Union, said that another four asked what was going

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3. According to Webb, a union official, Marie Tidwell, asked her in the fall of 1974 if she would reconsider her past refusals to join the Union. Webb replied: "The day that you tell me that I have to join the union in order to keep my job, that is the day I will join the union—and not until then." Webb recalled that Tidwell "kind of laughed" and said: "Well, I can tell you that."

on or if the Union would do the employees any good, and attributed to only four outright statements that opposed the Union. There were about 70 restaurant employees at the time.

In sum, Wills' and GeeGee's purported corroboration of Parker, although not wholly at odds with his testimony in the abstract, was so labored, inept, and lacking in consistent or meaningful detail as to suggest not only that their reports and predictions were nowhere near as frequent or compelling as depicted by Parker, but that the employee manifestations of antiunion feeling on which they reputedly were based also were grossly overblown, if not contrived *in toto.*

5. Parker further testified that his belief of the Union's lack of majority was influenced by Nevada's being a right-to-work state, and by the absence from the 1972-75 contract of a dues checkoff provision. The 1969-72 contract did not have a checkoff provision, either.

6. Another factor, according to Parker, was that the Union "was in trouble—or they wouldn't have had a trustee appointed." He admitted on cross-examination that his only information concerning the trusteeship situation had come from the newspaper articles mentioned above. By letter of August 9, 1974, Attorney Bowe for the Union had informed Clinton Knoll, the general manager of the Council, to which Respondent still belonged, that, while the Union had been placed in trusteeship by its International, with Bramlet serving as trustee, the Union's "status as the employees' representative under its collective bargaining agreement has not changed in any way."

7. Finally, according to Parker, he was influenced by there never having been a representation election among Respondent's employees.

B. *Discussion*

This case is a mirror image of *Nevada Lodge,* 227 NLRB No. 73 (1976), and *Tahoe Nugget, Inc.,* 227 NLRB No. 72 (1976). Issuance of this decision was delayed, pending issuance of those decisions by the Board, because of their obviously controlling impact over the present situation.

The Board held in *Nevada Lodge* and *Tahoe Nugget, Inc.* that "the presumption of majority status flowing from the contract in the multiemployer unit survives Respondent's timely withdrawal from that unit and carries over to the newly-created single-employer unit." *Nevada Lodge,* fn. 3. The Board further held in both cases, adopting the conclusions of Judge Taplitz without comment, that the assorted grounds advanced by Respondents in those cases, and this, to overcome the presumption—the newspaper articles, employee turnover, employee nonmembership in the Union, alleged reports by supervisors of employee dissatisfaction with the Union, minimal grievance activity by the Union, Nevada's being a right-to-work state, the absence of a representation election, etc.—did not accomplish that purpose.

It is concluded, therefore, that Respondent's refusal to recognize and bargain with the Union after its withdrawal from multiemployer-unit bargaining violated Section 8(a)(5) and (1) of the Act.

VI. *Conclusions of Law*

1. Silver Spur Casino is an employer engaged in and affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by Respondent Silver Spur Casino in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been the duly designated and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about December 20, 1974, and at all times material thereafter, to bargain collectively and to recognize the Union as the exclusive bargaining representative of Respondent's employees, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain collectively and to recognize the Union, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

• • • •

Upon the foregoing findings of fact, conclusions of law and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[4]

Respondent, Silver Spur Casino, Reno, Nevada, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize and to bargain collectively in good faith concerning rates of pay, wages, hours of employment, and other terms and conditions of employment with Hotel-Motel-Restaurant Employees and Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by Silver Spur Casino in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

---

4. All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Post at its Reno, Nevada, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 20, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated in San Francisco, California:

RICHARD J. BOYCE
Richard J. Boyce
*Administrative Law Judge*

## *Appendix*

SEAL NOTICE TO EMPLOYEES SEAL

Posted by Order of the
National Labor Relations Board
*An Agency of the United States Government*

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel-Motel-Restaurant Employees and

5. In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Bartenders Union, Local 86, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by Silver Spur Casino in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

SILVER SPUR CASINO
(Employer)

Dated..... By.....
(Representative) (Title)

---

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Bldg., Box 36047, 450 Golden Gate Avenue, San Francisco, CA 94102. Telephone: (415) 556-0335.

*United States of America*
*Before the National Labor Relations Board*
*Division of Judges*
*Branch Office*
*San Francisco, California*

Cases 20—CA—9803—1
20—CA—9853—1
20—CA—9869—1
20—CA—9897—1
20—CA—9905—1

NEVADA CLUB, INC.
and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

*Patricia S. Radez* and *Stuart R. Dvorin* of San Francisco, Calif., for the General Counsel.
*Geoffrey V. White* of *Davis, Cowell & Bowe*, San Francisco, Calif., and *Howard Lawrence* of Reno, Nev., for the Charging Party.
*William W. Wertz* of *Severson, Werson, Berke & Melchior*, San Francisco, Calif., for the Respondent.

## DECISION

### *Statement of the Case*

ROGER B. HOLMES, Administrative Law Judge: The original charge in Case 20-CA-9803 was filed on December 16, 1974, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. That charge was amended seven times thereafter by the Union on various dates, the last date being

June 2, 1975. The original charge in Case 20-CA-9853 was filed on January 10, 1975, by the Union, and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9869 was filed on January 16, 1975, by the Union, and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9897 was filed on January 23, 1975, by the Union, and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9905 was filed on January 27, 1975, by the Union, and a first amended charge in that case was filed on May 7, 1975, by the Union, and a second amended charge in that case was filed on June 25, 1975, by the Union.

An order consolidating cases, consolidated complaint and notice of hearing was issued on August 27, 1975, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of Region 20 of the Board. That document, *inter alia,* consolidated the foregoing charges and various other charges, and on September 18, 1975, the Regional Director for Region 20 of the Board issued an order granting severance of Respondents as to certain named respondents. Thereafter, the Regional Director for Region 20 of the Board issued on October 3, 1975, an amended consolidated complaint and notice of hearing involving the charges set forth above. The amended consolidated complaint alleges that Nevada Club, Inc., herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. The Respondent filed answers to the consolidated complaint and amended consolidated complaint and denied, *inter alia,* the commission of the alleged unfair labor practices.

The trial was held before me on May 11, 12, 13, 27 and 28, 1976, at Reno, Nevada. Briefs were timely filed by August 6, 1976, by the General Counsel, by the Charging Party and by the Respondent and have been duly considered.

This matter was heard on a calendar call basis with another matter, *Finally, Inc., d/b/a Palace Club,* which was scheduled to be tried immediately following the conclusion of this trial. Inasmuch as the *Palace Club* matter had the identical case numbers as this proceeding, I advised the parties at the outset that I was adding a suffix -1 to the case numbers involving the Respondent herein, Nevada Club, Inc., and adding a suffix -2 to the case numbers involving the *Palace Club.* This was done merely for purposes of clarity since these are two separate proceedings involving two separate respondents.

Upon the entire record[1] and based upon my observation of the demeanor of the witnesses, I make the following:

## FINDINGS OF FACT

### I. *Jurisdiction*

The question of whether the Board should assert its jurisdiction over the Respondent is an issue in this proceeding. While the Respondent admits the factual allegations regarding its revenues and business operations, it asserts that the Board should decline to assert jurisdiction.

The Respondent introduced copies of the regulations of the Nevada Gaming Commission and State Gaming Control

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1. In view of the length of the transcript, it is not surprising that there are numerous inadvertent clerical errors in the transcript, but those can be recognized as such without detailed correction of the record. However, an inadvertent error at page 355, line 6, of the transcript conveys the exact opposite meaning of what was said. The words "do not" should have been inserted there and I hereby correct the record so that the sentence correctly reads: "I do not want that to indicate that I agree with any of the characterizations which have been handed back and forth between Counsels."

Board, and amendments thereto, and copies of the Nevada Gaming Control Act and ancillary statutes, as amended. The Respondent also introduced financial data for fiscal year 1973 showing the revenue to certain states from parimutuel betting and other gaming, which shows, among other things, that the State of Nevada was fourth among the various states in such gaming revenues and that New York, California and Florida received more revenues from gaming at that time. The Respondent further introduced a statistical summary and related information prepared by the National Association of State Racing Commissioners regarding horse racing and greyhound racing in various locations.

The Respondent points to the extensive state regulation of the gaming industry in Nevada and points to the fact that the Board in the past has declined to assert jurisdiction in the horse racing and dog racing industry.

The Board has considered the extensive state regulation of the gaming industry in the State of Nevada in *El Dorado Inc., et al.,* 151 NLRB 579 (1965). The Respondent correctly points out that the Board's decision was made 11 years ago, and the present record shows some amendments to the state regulations in 1973, 1974 and 1975. However, the Board has more recently been presented with the issue of whether to assert its jurisdiction over the operation of a jai alai fronton adjacent to the MGM Grand Hotel in Las Vegas, Nevada, in *Grand Resorts, Inc.,* 221 NLRB No. 121 (1975). In that case, the Board applied the *El Dorado* rationale and concluded that: "In the circumstances of this case we see no reason why the foregoing rationale should not be applied here and therefore reject the contention that we should decline jurisdiction because of the extensive degree of regulation exercised by the State over the Employer's jai alai operation."

In the earlier *El Dorado* case, the Board also considered the argument that it had declined to assert jurisdiction over the horse racing industry, the Board concluded:

> The Employers urge that the Board follow its decision in *Walter A. Kelley,* [139 NLRB 744] where, under Section 14(c), we declined to assert jurisdiction over the horse racing industry. However, the *Kelley* case does not require us to forsake jurisdiction herein. In *Kelley,* it was our conclusion that "The Board's limited resources can be better devoted to industries and operations where labor disputes are likely to have a more substantial impact on commerce than disputes in the racing industry." In the instant matter, as we have already sought to make clear, a labor dispute in an industry which directly employs a large number of employees in the dominant industry in the State and is dependent upon substantial and closely related interstate activity could disrupt commerce substantially.
>
> Upon consideration of all the foregoing, we conclude that it would effectuate the purposes of the Act to assert jurisdiction over the Employers whose gross annual revenue from gambling operations is in excess of $500,000. [Footnotes omitted.]

The Respondent herein is engaged in the operation of a restaurant, bar and casino in Reno, Nevada, and during 1974, received gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $10,000 which originated outside the State of Nevada.

Upon those facts and after consideration of the Board precedents cited above, I find that the Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## II. *The Labor Organization Involved*

It is admitted that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

## III. *The Alleged Unfair Labor Practices*

### A. *The Issues*

The principal issues presented in this proceeding are:

1. Whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multi-employer contract, after the Respondent timely withdrew from the multi-employer unit.

If the answer to the foregoing question is in the affirmative, then we reach the second issue, which is:

2. Whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974, or,

(a) Whether the Respondent has shown that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status, or,

(b) Whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

## B. *The Background*

The following facts in this section are based on admissions in the pleadings, stipulations of the parties and documentary evidence:

The Reno Employers Council, herein called the Council, is a Nevada corporation with an office located in Reno, Nevada, and has been at all times material herein, a voluntary association of employers who are engaged in the hotel, casino and restaurant industry and other industries. The Council, at all times material herein, has existed for the purpose, *inter alia,* of representing its employer-members in collective bargaining and negotiating and administering collective-bargaining agreements on behalf of its employer-members with various labor organizations, including the Union herein.

Since an unknown date in 1951, the Respondent has been represented for purposes of collective bargaining by the Council and/or its predecessors in a multi-employer collective-bargaining unit, whose constituent membership has changed from time to time. The representation by the Council has continued from that date in 1951 up to and through the expiration of the most recent collective-bargaining agreement which expired on February 15, 1975. Since 1956, the Union and the Council, on behalf of its employer-members, including the Respondent and others, have been parties to a series of multi-employer collective-bargaining agreements, the most recent of which was effective from February 16, 1972, through February 15, 1975.

Other collective-bargaining agreements introduced in evidence are: a contract between the Council and the Charging Party Union and Culinary and Hotel Service Union, Local 45, which had effective dates of August 15, 1956, through August 15, 1961; a contract between the Council

and the Union and Local 45, which had effective dates from August 16, 1961, through February 15, 1963; a contract between the Council and the Union and Local 45, which had effective dates from February 15, 1963, through February 15, 1966; a contract between the Council and the Union and Local 45, which had effective dates from February 15, 1966, through February 15, 1969; a contract between the Council and the Union, which had effective dates from February 16, 1969, through February 15, 1972, and the most recent contract referred to above which was between the Council and the Union and which had effective dates from February 16, 1972, through February 15, 1975.

Article I of the most recent collective-bargaining agreement between the Council and the Union reads as follows:

> ARTICLE I
> JURISDICTION
>
> The Employer agrees that at all times during the period this contract is in full force and effect, to recognize the Union as the sole collective bargaining agency for the employees who are working under the Union's jurisdiction in the classifications listed herein. This contract shall cover all working conditions, wages and hours of the employees and shall be binding upon both the employees and the Employers of all establishments hereinafter mentioned.

The parties stipulated that the Bartenders Local 86 and the Culinary and Hotel Service Union Local 45 merged in 1968 to form the Union which is the Charging Party herein.[2]

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2. The stipulation is reflected at page 117 of the transcript, but an inadvertent clerical error in the transcript shows the local number as "35", which should have read "45"; therefore the transcript is corrected in that regard.

On or about December 11, 1974, the Respondent timely withdrew its membership from the Council.

All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

### C. *The Correspondence*

The parties stipulated that the following correspondence was sent and received:

On November 15, 1974, a letter was sent from the Union to the Council in which the Union gave notice of its desire to change and modify the terms and conditions of the collective-bargaining agreement for the period following February 16, 1975. The letter asked that the Council communicate with Al Bramlet, International Trustee, to arrange for collective bargaining negotiations. On the same date, November 15, a separate letter was sent from the Union to the Respondent and in substance conveyed the same information to the Respondent.

On December 11, 1974, the Respondent sent a letter to the Council in which the Respondent withdrew its authorization from the Council and Clinton G. Knoll as General Manager of the Council, to represent the Respondent in connection with collective bargaining or labor relations matters. The letter states that a copy of that communication was being sent to the Union.

On December 12, 1974, the Respondent sent a letter to the Union in which the Respondent said it was enclosing a copy of its letter to the Council and also gave notice by the Respondent of termination of the collective-bargaining agreement as of the end of its term.

On December 12, 1974, the Council sent a letter to the Union in which the Council acknowledged receipt of the Union's letter dated November 15 and in which the Council advised that the Council was not authorized to represent any of the signators to the agreement for collective-bargaining purposes. The letter expressed the understanding that all of the signators to the agreement had already advised the Union of that fact.

Also on the same date, December 12, 1974, the Council sent a separate letter to the Union in which the Council gave notice of the termination of the collective-bargaining agreement as of the end of the day on February 15, 1975.

On December 13, 1974, the attorney for the Union sent a letter to the Council in which the Union said that no response had been received to the Union's letter dated November 15, 1974, and advised that refusal to bargain charges would be filed with the Board without further notice unless the Council immediately contacted Bramlet.

Also on the same date, December 13, 1974, the attorney for the Union sent a letter to the Respondent in which the substance of the letter to the Council of that date was conveyed to the Respondent.

On December 17, 1974, the attorney for the Union sent a letter to the Council with carbon copies to certain employers, including the Respondent in this case. The letter asserted that the Council and its clients were notified on November 15 of the Union's reopener demand and the contract termination notice from the Council was, therefore, meaningless. The Union advised that the Union had filed unfair labor practice charges with the Board alleging a refusal to bargain and advised that, contrary to the Council's letter of December 12, certain establishments, including the Respondent herein, had not individually notified the

Union of their withdrawal of authorization from the Council.

On December 20, 1974, the attorney for the Respondent and certain other employers sent the following letter to the Union:

> This is in reply to the recent letter from your attorney to the following whom we represent:
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> | | |
> |---|---|
> | Nevade Club | Reno Nugget |
> | Palace Club | Silver Spur |
> | Ponderosa | Sparks Nugget |
>
> As you are aware from letters recently sent you from each of them and from the Reno Employers Council, each of our clients has timely withdrawn from the multi-employer group and each is handling its own collective bargaining. The bargaining unit, therefore, is entirely different as far as each of our clients is concerned.
>
> Although it is not clear from your attorney's letters as to what unit you are claiming or whether you claim to represent a majority of each of our clients' employees in an appropriate unit, we will treat his letter as though he has on your behalf requested bargaining in a unit consisting of culinary and bartender employees in each of the named establishments.
>
> Pursuant to instructions from each of our clients, on behalf of each of them individually, we hereby inform you that each individually has a genuine doubt that your Local continues to represent an uncoerced majority of their respective employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our clients individually will at such time fulfill whatever legal obligation they may individually then have.

Should your Local file a petition with the Board for an election, each of our clients, individually, will cooperate looking toward an election under the Labor Management Relations Act, 1947, as amended and the Board's applicable Rules and Regulations.

D. *The Factors Relied Upon by Ms. Fitzgerald for Withdrawing Recognition from the Union*

Meta K. Fitzgerald has been the secretary-treasurer of the Respondent for many years. Prior to becoming a corporation, the business was operated as a partnership. She estimated that the business has existed for 30 years.

Ms. Fitzgerald was the one who made the decision which resulted in the Respondent's withdrawal of recognition from the Union on December 20, 1974. She testified to various factors which she relied upon in making that decision for the Respondent. She gave the following factors:

(1) the fact that no grievances had been filed at any time against the Respondent. She described that factor as being ". . . the biggest thing." However, Ms. Fitzgerald said that she was familiar with the terms of the most recent collective-bargaining agreement during its existence and she acknowledged that to the best of her knowledge she had lived up to the terms of that contract.[3]

(2) the fact that the State of Nevada has a right-to-work law. She said that there was no requirement when employees were hired that they join the Union or not join the

3. Marie Tidwell, who has been business agent of the Union since 1966, stated that she did not file any grievances against the Respondent and that she never had any request from employees to file grievances against the Respondent. She testified that she visited the Respondent's premises for lunch and dinner, and that during 1972 through 1974, she visited the Respondent's premises 3 or 4 times a night in her capacity as business agent of the Union to talk to the employees of the Respondent and to observe working conditions.

Union and that the matter was never discussed by the Respondent with the employees.

(3) the fact that the Union was engaged in an organizing effort in the Reno and Lake Tahoe areas. She had read two newspaper articles which had appeared on August 20 and 22, 1974, in the *Nevada State Journal* concerning the Union. The article which appeared in that newspaper on August 20, 1974, reads as follows:

> CULINARY EMPLOYES' WORKING CONDITIONS CALLED UNDESIRABLE
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> Culinary employes' working conditions in Northern Nevada are hardly desirable. Al Bramlet, secretary-treasurer for Culinary Local 226 in Las Vegas, charges in this month's edition of "Topics," the local's magazine.
>
> Bramlet was appointed several months ago as international trustee of Local 86 in Reno to organize the general Reno and Lake Tahoe areas.
>
> Culinary employes in Northern Nevada are working under conditions their Southern Nevada counterparts "suffered under 20 years ago." Bramlet claims in the magazine article.
>
> He could not be reached Monday for further comment.
>
> The article says:
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> "Employes are working six days at straight time. No overtime. A team of two maids at one downtown Reno hotel is assigned to prepare 65 rooms per day, plus washing the windows. For this staggering work load, they receive $16 per shift."
>
> The culinary local does not cover all casino personnel. It represents maids, employes in other cleanup capacities, bartenders, cocktail waitresses, restaurant personnel, change girls and booth cashiers.
>
> "Most important and most pathetic is the fact that our co-workers in Reno and Lake Tahoe are scared."

Bramlet said, "They're afraid to report violations of the state's labor laws, afraid to demand overtime, afraid to do anything but blindly obey orders from the boss."

Les Kofoed, director of the Gaming Industry Association of Nevada, declined to comment Monday in response to Bramlet's remarks.

In the article, Bramlet also said employes in Northern Nevada were fired at the discretion of their employer with no avenues for grievance or redress.

He claimed many employes don't receive the two 10-minute work breaks required by state law and that change girls cannot accept tokes under the treat (sic) of being fired.

"Almost without exception, the first plea from each worker was for job protection," Bramlet said. "Frankly, I am amazed at what exists in Northern Nevada. It is almost another world for the people in our industry."

Bramlet is scheduled to be in the Reno and Lake Tahoe areas Aug. 22 and 23 to discuss problems with local employe groups.

Clinton Knoll, representative for the Reno Employers' Council, could not be reached for comment Monday.

Ms. Fitzgerald said that the name of Al Bramlet was a new name to her, and she pointed out that he came from another area. She said that the fact that he was an international trustee indicated to her that the Union needed help from the international organization and "apparently that they admitted that they were financially embarrassed."[4]

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4. Clinton Knoll, who is general manager of the Nevada Association of Employers d/b/a Reno Employers Council and who has been with the Council for about 25 years, stated that he did not receive any questions from Ms. Fitzgerald or any representative of the Respondent as to the status of the Union after it was in trusteeship, nor was the matter discussed by him with Ms. Fitzgerald or any representative of the Respondent.

She said that she was aware that officers of the Union had changed in the past. She also stated that although the newspaper article referred to the Union's calling the employees' working conditions "undesirable", that no grievances were filed by the Union with the Respondent.

The article in the *Nevada State Journal* newspaper for August 22, 1974, reads as follows:

Union Leader Cites Growth,
Calls Reno Conditions 'Archaic'

Southern Nevada labor leader Al Bramlett said Wednesday membership in Northern Nevada's Culinary Union has doubled in 2½ months as part of a full-scale campaign to organize Reno and Lake Tahoe food and beverage workers.

Bramlett, recently named international trustee for Local 86, which serves the Reno-Tahoe area, said dues paying members have grown from about 900 to more than 1,800 since May.

He said he was sent north because the conditions in the Reno-Tahoe area are "archaic" compared with Las Vegas.

He said Reno food and beverage workers have no job security, no benefits, no seniority provisions and often make more than $10 a shift less than their Las Vegas counterparts.

The union serves bartenders, cooks, any position dealing with the preparation and serving of food and beverages, as well as housekeeping positions, change girls and cashiers.

"Our ultimate objective is to bring to Reno-Tahoe the benefits of a union contract which we enjoy in Southern Nevada," Bramlett said.

"The major obstacle is the resistance of the industry itself, but we are here to stay," he said.

He said, for example, a Reno fry cook who gets $24.17 a shift would get $36.20 in Las Vegas and a

bartender making $25.82 in Reno would receive $34.20 in the south.

He said similar disparity exists in many of the jobs covered by the Culinary Workers Union.

Bramlett said the big difference is that Las Vegas is 98 per cent unionized while Reno-Tahoe is less than 20 per cent.

He also said some employers in Northern Nevada have warned their employes to stay out of discussions with union men. He said his business representatives have been watched, followed and harassed.

He said, however, union strength is growing fast in the north and that the real test will come in November when the northern local contract expires at Lake Tahoe. He said the Reno contracts expire in Feburary and that, by then, he hopes to have many more culinary workers in the area unionized.

Ms. Fitzgerald stated that since the Union had 20 percent of the employees organized in the Reno and Lake Tahoe areas after 2½ months of all-out organizing, she concluded that the Union must have had less than 10 percent of the employees as members of the Union prior to the organizing. She added that she did not think that the Union had even less than 10 percent members in her organization.

(4) the fact that no employees had requested representation.

(5) the fact that there had not been an election.

(6) the fact that there had been turnover among the employees in 1972, 1973 and 1974. Ms. Fitzgerald did not actually review any of the payroll records, but she said that she had conversations with the office manager, Eileen Kroft, regarding the turnover of employees for that 3-year period. While she acknowledged that she did not make any independent investigation of the records, she said that she was aware of all of the hiring and firing of employees. When

she was asked if she based her determination of the high rate of turnover on her own awareness of the general rate of turnover, she answered in the affirmative. When she was asked if she had made a reasonable estimate in her own mind, she again replied in the affirmative. Ms. Fitzgerald also stated that she was aware of the high rate of turnover in the gaming industry. She acknowledged that some classifications, such as bus boys and dishwashers, have a high turnover rate, while bartenders have a lower turnover rate. She pointed out that some employees of the Respondent have been there a long time, but some other employees ". . . are constantly turning over." She gave her opinion that the turnover among employees of the Respondent during the past 10 years has been "large." She characterized the turnover for the years 1972, 1973 and 1974 as "great", but when asked about the basis for her comparison, she acknowledged that she had not reviewed the rate of turnover for the past 10 years as compared with the 3-year period. When she was asked whether she had any way of determining whether the turnover during the 3-year period was unusual, Ms. Fitzgerald responded: "I have a feeling it is unusual." Ms. Fitzgerald also gave her opinion with regard to the 3-year period that: "The roster changed so much, and there was so much turnover, they could not possibly be representing all these people." Based upon her conversations with Ms. Kroft, she concluded that the turnover among employees for the 3-year period was "tremendous" and "well over a hundred percent."

(7) the fact that there were constant rumors from other casinos and radio announcements. Ms. Fitzgerald said that she did not like rumors, "but we have them all the time from other casinos. So, there were constant rumors." She did not reveal the contents of the rumors, nor did she reveal what the radio announcements were which she relied upon.

(8) the facts told to her in conversations with Office Manager Kroft and Chef Harry Setn. Ms. Fitzgrald said that she saw Ms. Kroft on a daily basis and had conversations with her during the period between August 20 and December 20, 1974, on a "more or less constant" basis about the Union. Ms. Fitzgerald stated that Ms. Kroft told her: "It was her thought that we had very few members of the Union. She had various people that had said they really didn't want to be represented and had no interest in it." Ms. Fitzgerald said that Ms. Kroft told her it was her opinion that the majority of the employees of the Respondent were not members of the Union. She said: "It was a general conversation and we did not discuss that with employees. We are not permitted to discuss that with the employees. We did not question any employees if they did belong to the Union or if they did not belong to the Union. That's the Union's privilege. It is not ours." Ms. Fitzgerald said that Ms. Kroft may have mentioned to her the names of employees who were not union members, but she did not recall the names at the trial, or the number of names that might have been mentioned.

Ms. Fitzgerald also related conversations which she said that she had with Harry Seth, who was the chef at the time, during the period between August and December 1974.[5] Ms. Fitzgerald said that he told her: "He knew of only two people who were union members." She said that there were 25 to 30 employees under the supervision of Seth at the time and 105 or 106 employees in the bar and culinary classifications of the Respondent at that time. Ms. Fitz-

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5. Seth had died prior to the trial in this matter, and the testimony regarding these earlier conversations with him has been given close scrutiny in view of that fact. *Sears, Roebuck and Co.*, 224 NLRB No. 89 (1976); *Wallick and Schwolm Company*, 95 NLRB 1262 (1951).

gerald said that in other conversations, Seth said "That they were not union members as far as he could see."

### E. *The Information Communicated by Office Manager Kroft to Ms. Fitzgerald*

Eileen Kroft has been employed by the Respondent for about 11 years. Most of that time, she worked as a bookkeeper, but since January 1972, she has been the office manager of the Respondent.

Sometime after the newspaper articles appeared in the *Nevada State Journal,* Ms. Fitzgerald asked Ms. Kroft to make an analysis of the payroll records for 1972, 1973 and 1974. According to the testimony of Ms. Kroft, she was in contact with Ms. Fitzgerald daily and, ". . . we discussed this pretty much daily, I would say." Ms. Kroft testified: "I don't think that we specifically spoke about any specific numbers as such. I might have referred to it in percentages, or said: this is a lot of people that left in this period of time, or this kind of general conversation. I did not say: you had this many people here. No, I did not say that."

Ms. Kroft said that the percent of turnover among the bar and culinary employees of the Respondent was "well over 100 percent" for the years 1972 and 1973, and over 100 percent for the years 1974 up to and including December 20, 1974. She said that she communicated these percentages to Ms. Fitzgerald during the period of time between August 20, 1974, and December 20, 1974.

Ms. Kroft gave her opinion at the trial that there had been a high rate of turnover among the Respondent's culinary employees during her 11 years of employment there; however, she later qualified that to refer to the time since she became office manager because prior to that time, as

the bookkeeper, "I wasn't paying attention to percentages at that time."

During the period between August 20 and December 20, 1974, Ms. Kroft had several conversations with the chef, Harry Seth. She said that she related the substance of those conversations to Ms. Fitzgerald during that period of time. The first such conversation concerning the Union took place in the first part of September 1974. According to Ms. Kroft, Seth told her that he was aware of the Union being in the area and that the Union was trying to recruit members. He told her that he did not believe that there were many members of the Union. She said that he was speaking about the Respondent's business. She added: "Well, we did discuss, you know, the percentage of turnover and the people in relation to how many people we think would be there or would be represented by the Union, and he advised me that, again, it was his opinion and his actual knowledge of seeing people come and go, that the turnover was in excess of 100 percent."

In a subsequent conversation with Seth, Ms. Kroft said that she was told: "Well, he did say it was his observation that not very many people expressed any interest in the Union. He also related to me that he knew of two people that were dues paying members of the Union." She said that he named the two persons—a head dinner cook and a kitchen worker—whom she said were no longer employed by the Respondent prior to December 20, 1974.

Other conversations with Seth during the period were described more generally by Ms. Kroft as follows: "Well, like I say, we were always discussing—not always discussing, but periodically discussed how much of a percentage he felt would be represented or not represented, and he would

express to me that in his opinion by some of the statements made to him by the other culinary workers that they were not interested in belonging to a union or being represented by a union."[6]

Three fry cooks, who were still employed by the Respondent at the time of the trial, also spoke to Ms. Kroft according to her testimony.[7] She said that the conversations took place in September 1974 and that she reported the substance of the conversations to Ms. Fitzgerald either the same day on which the conversations took place or the very next morning. However, she said that she did not tell Ms. Fitzgerald the names of the three employees.

Ms. Kroft said that the first conversation was with Rene Sandobal during the first part of September 1974. According to Ms. Kroft, Sandobal told her: "He just told me that he was not a member of the Union and he had no intentions of becoming one because he couldn't see that the Union had ever done anything for any of its members and he couldn't see joining."

Another fry cook, Virginia Wooten, talked to Ms. Kroft later in September 1974. Ms. Kroft stated: "Well, Virginia approached me and told me that she knew of the recruitment efforts on the part of the Union and we didn't have anything to worry about as far as she was concerned, because she wasn't interested in the Union."

About 5 days later, still another fry cook, Gilbert Bullock, told Ms. Kroft that he was not interested in the Union and that the Respondent had nothing to worry about.

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6. As noted earlier, Seth was deceased by the time of the trial, and the testimony regarding conversations with him has been examined closely.

7. None of the three fry cooks were called as witnesses by any of the parties.

F. *The Respondent's Second Defense*

In addition to its defense that the Respondent has a reasonably based doubt of the Union's majority status, the Respondent urged as another defense that the Union did not, in fact, represent a majority of the Respondent's bar and culinary employees on December 20, 1974, when it withdrew recognition from the Union. In connection with that contention, the Respondent called Howard Lawrence as a witness during the presentation of the Respondent's defense. Lawrence began working for the local union on June 14 or 15, 1974, which was shortly after the local union was placed in trusteeship on June 7, 1974.

Lawrence is the business representative and the assistant to the International Trustee of the local union. Additionally, about 3½ weeks prior to the trial in this matter, Lawrence was named the chief executive officer of the local union. As the ceo of the local union, Lawrence is the principal custodian of the Union's records. Lawrence testified that the Union maintained membership records on an alphabetical basis. The Respondent's attorney asked Lawrence whether there were any other records that the Union had in existence at the time between August 20 and December 20, 1974, which would disclose that the Union represented a majority of the employees employed by the Respondent. The lengthy discussion of the objections to that inquiry is set forth on the record. I indicated that I would overrule the objections by the General Counsel and the Charging Party to a modification of that question by the Respondent's attorney. At page 585 of the transcript, I said: "In other words, I will sustain and rule proper your question for Union records, whether the Union has records to show union majority support as of December 20, 1974." The Respondent's attorney then stated: "Then I will adopt that particular statement by the Administrative Law Judge as

my question directed to the witness." Counsel for the General Counsel inquired whether the term "union majority support" indicated union membership alone. I responded "no"; whereupon counsel for the General Counsel asked: "Your Honor is then indicating any records showing union members, non-members, adherence, non-adherence, those in favor, those against? Any records showing the totality of the unit, rather than the mere question of whether or not there is members, union members existing." In response, I replied in the affirmative and pointed out that majority support does not mean just members of the Union.

Thereafter, the Charging Party exercised its right under the Board's Rules and Regulations to file a request for special permission to appeal that ruling. The General Counsel filed a memorandum in support of the Charging Party's interim appeal, and the Respondent filed a memorandum in opposition. The Board granted the appeal and reversed the ruling. I introduced all of the foregoing documents into the record as Administrative Law Judge's Exhibits 1 through 5.

Prior to calling Lawrence as a witness, the Respondent had called Alfred E. Staff who had been president of the local union for 2 years prior to his resignation on June 7, 1974. Staff testified that all officers of the local union resigned at that time to turn the local over to the International Union so that the International Union could come in and organize.[8] In view of his resignation from union office

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8. Lawrence testified that he was told in May 1974 by an International Vice President of the Union that Lawrence would be transferred from his position as an international organizer in the Sacramento, California area, possibly to work in the Reno area. Lawrence said that the International Vice President told him: "He said that the Local was going to be placed into trusteeship and additional staff and money was going to be put into that area under international control. He also stated that the international intended to invest a substantial amount of money into northern Nevada and of a wish to retain control of that money and that investment." Lawrence also testified that as of June 1, 1974, the local union had no bills which the local union was unable to pay.

more than 6 months prior to the time that the Respondent withdrew recognition from the Union, I ruled that his testimony regarding the Union's records in the spring of 1974 was not relevant to the issue of whether the Union, in fact, represented a majority of the bar and culinary employees of the Respondent on December 20, 1974.

### G. *Analysis and Conclusion*

The threshold question to be determined is whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multi-employer contract, after the Respondent timely withdrew from the multi-employer unit.

In *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), the Board stated:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.[1] This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.[2] Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful.

1. *Celanese Corporation of America,* 95 NLRB 664, 671-672.
2. *Id.*

In the present case the Union has not been certified by the Board as the bargaining representative in either the multi-employer unit or the single-employer unit. Nevertheless, the Board has applied the principles set forth in the *Terrell Machine* case whether the union has been certified by the Board or recognized as the bargaining representative. In *Bartenders, Hotel, Motel and Restaurant Employ-*

*ers Bargaining Association of Pocatello, Idaho*, 213 NLRB 651 (1974), the Board stated:

> The above principles set out in *Terrell* are equally applicable whether the union has been certified by the Board, or, as here, recognized as the bargaining representative of the employees by Respondent without Board certification.[3] In the latter situation, the existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.[4] Following the expiration of the contract, as here, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so,[5] here Respondent.

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3. See *Emerson Manufacturing Company, Inc.*, 200 NLRB 148 (1972); *Cantor Bros., Inc.*, 203 NLRB 774 (1973).

4. *Shamrock Dairy, Inc., et al.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

5. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc., and Consolidated Hotels of California*, 470 F.2d 669 (C.A. 9, 1972).

In the instant case, the Union for a number of years has been the recognized collective-bargaining representative of all of the employees in the multi-employer unit, which has included the bar and culinary employees of the Respondent.[9] The Union has also been a party to a series of consecutive collective-bargaining agreements beginning in 1956 which

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9. In her brief, counsel for the General Counsel points out: "The Board has held that unless a majority of an employer's employees desire representation by a union, that employer may not lawfully force representation on them by joining a multi-employer bargaining arrangement, *Mohawk Business Machines Corporation*, 116 NLRB 248; *Dancker & Sellew, Inc.*, 140 NLRB 824, enf. 330 F.2d 46 (C.A. 2, 1964)."

have covered the bar and culinary employees of the Respondent, together with the employees similarly classified who were employed by other employer-members of the Reno Employers Council. Thus, for the period from August 15, 1956, through February 15, 1975, the successive contracts negotiated by the Union and the counsel on behalf of the Respondent and the other employer-members of the Council, have been applicable to the bar and culinary employees of the Respondent.

Under the *Celanese, Terrell Machine* and *Bartenders* cases referred to above, the Union has enjoyed a "dual presumption of majority," That is, under the Board precedents, the Union is presumed to have been the majority representative of the employees covered by the contract at the time that the contract was executed and further the Union is presumed to have continued its majority status at least through the life of the contract. Even after the expiration of the contract, the rebuttable presumption of majority status continues in favor of the Union under Board law. Thus, the legal presumption of the majority status of the Union was operative in the multi-employer unit at the times material herein, and I conclude that the legal presumption also operates in favor of the Union's majority status among the bar and culinary employees of the Respondent who were a part of that larger unit. To hold otherwise would conflict with the Board's policy as stated in *Terrell Machine*, ". . . to promote stability in collective-bargaining relationships, without impairing the free choice of employees."[10] If each

10. The attorney for the Charging Party points out in his brief that the Board has remarked on stability in industrial relations in *United Supermarkets, Inc.*, 214 NLRB No. 142 (1974), at slip opinion, page 6: "Moreover, to require the incumbent union to reestablish its majority support upon demand would necessarily disrupt bargaining relationships, and we have repeatedly emphasized that stabilization in industrial relations is the ultimate objective of all provisions in the Act."

time an employer withdrew from a multi-employer unit, the presumption of majority status ceased to be operative, then a question concerning representation would automatically arise and stability in collective bargaining would not be achieved.

However, finding that the legal presumption of majority status flowing from the multi-employer collective-bargaining agreement remains operative among the bar and culinary employees of the Respondent who were a part of that unit, is not a conclusive determination of majority status. It is just a legal presumption and nothing more. The presumption is rebuttable and may be overcome in either one of the two ways described by the Board in the *Terrell Machine* case.

I am not unmindful of the Board's comment made in a different context that when an employer or a union withdraws from a multi-employer unit, the union involved may be faced with the possibility of demonstrating its majority status in the individual employer unit. In its landmark decision, *The Evening News Association, Owner and Publisher of "The Detroit News,"* 154 NLRB 1494 (1965), enf'd 372 F.2d 569 (1967), the Board held that the previously existing rules governing employer withdrawal from multi-employer units should be applied on an equal basis to union withdrawal from such units. In its rationale, the Board stated at page 1499:

> In either case, the withdrawing party forces the other to forego bargaining in the established multiemployer unit, and in either case, the union may be faced with the possibility of having to demonstrate that it has been designated by a majority of the employees in the individual employer units resulting from the breakup of the multiemployer unit, if it is to retain its status as the bargaining representative of such employees.

The use of the words "may" and "possibility" by the Board in the portion of the decision quoted above suggests that the Board meant that a union would not be required to demonstrate its majority status in the individual employer unit in every case, but that it may face the possibility of having to do so. An example of such a possibility might be where an employer timely filed an RM petition for an election and that petition was properly supported by the "objective considerations" required by the Board's decision in *United States Gypsum Company,* 157 NLRB 652 (1966). Another example might be where another labor organization timely filed an RC petition for an election and that petition was properly supported by at least 30 percent of the employees in the individual employer unit. Still another example might be where an RD petition for an election was timely filed and was properly supported by at least 30 percent of the unit employees. In those circumstances, a union might face the possibility of having to demonstrate its majority status in the individual employer unit.

After considering all of the foregoing, the arguments and briefs by the parties, the entire record and the Board law, I conclude that a rebuttable presumption of majority status did exist in favor of the Union on December 20, 1974, in the single-employer unit of the Respondent's bar and culinary employees.

Having made a determination with regard to the first issue, it is now necessary to determine whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974. To answer that question, we must decide whether the Respondent has shown that it had a reasonably based doubt, which

was based upon objective considerations, of the Union's majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status. Secondly, we must also decide whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

The Board has recently reiterated that a union's presumption of majority status in these circumstances is rebuttable, and the Board has restated how such presumptions may be rebutted. In *Burns International Security Services, Inc.*, 225 NLRB No. 40 (1976), the Board stated at slip opinion, page 6:

> These presumptions may be rebutted, however, by evidence establishing that the union no longer enjoys majority representative status. Also, even without such a showing of loss of majority, an employer may refuse to bargain if he relies on a reasonably based doubt as to the continued majority status of the union. As to a reasonably based doubt, two prerequisites for sustaining that defense are that the asserted doubt must be based on objective considerations[5] and such doubt must be raised in a context free of unfair labor practices.[6]
>
> Applying these principles, it is clear that when, on October 1, 1973, the Respondent notified the Union that it would not participate in renegotiation of the then current contract, which was to expire 2 months later in December 1973, the Union was entitled to a presumption of majority status. Therefore, as the Respondent announced, on October 1, 1973, that it doubted the

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5. *N.L.R.B. v. Gulfmont Hotel Company*, 362 F.2d 588 (C.A. 5, 1966), enfg. 147 NLRB 997 (1964).

6. *Nu-Southern Dyeing & Finishing, Inc., and Henderson Combining Co.*, 179 NLRB 573, fn. 1 (1969), enfd. in part 444 F.2d 11 (C.A. 4, 1971).

> Union's majority status, it was the Respondent's burden to show either that the Union had, in fact, lost its majority status or that the Respondent had, on the basis of objective facts, a reasonable doubt about that status.

At the outset, it should be noted that the withdrawal of recognition in this case took place in a context which was free of any other alleged unfair labor practices.

I have accepted the testimony of Ms. Fitzgerald as to the factors which she said that she relied upon in making the decision to withdraw recognition from the Union on December 20, 1974, insofar as she had knowledge of those factors as of December 20, 1974. The Board has made it clear that knowledge acquired after the fact of withdrawal of recognition cannot support a reasonably based doubt at the time of the withdrawal of recognition. In *Orion Corporation,* 210 NLRB 633 (1974), the Board stated at page 634:

> The Respondent first learned of this evidence at the hearing—long after it withdrew recognition from the Union. Assuming such evidence were relevant to a showing of a reasonable basis for doubt, it cannot have a bearing here, since facts regarding union support ascertained after the refusal to bargain are not controlling, or even guiding, in determining whether the Employer had a reasonable basis for doubt at the time it refused to bargain. Rather, what is controlling is whether the Respondent had a reasonable basis for doubt at the time it refused to bargain.

The Board similarly held in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651 (1974), at pages 652 and 653:

> As noted above, the stipulation that less than a majority of the employees in the unit were members of the Union on the date of the refusal to bargain cannot

serve as a factor demonstrating lack of majority support. Furthermore, since the information on the size of the Union's membership on the day of the refusal to bargain came to Respondent's attention only at the hearing in this case, it cannot be relied on to alternately support a reasonably based doubt of continued majority support.[12] As has been stated, ". . . when the Board makes this determination [as to the basis of the Employer's doubt] it is not controlled, or even guided, by the later ascertained facts of union adherence and non-adherence. It is rather the question of fact whether the company had a reasonable basis *at the time of its refusal to bargain* for believing that majority support of the bargaining union no longer existed."[13] Thus, because Respondent "did not know of the actual minority of union members until *after* its refusal to bargain, it can not rely on that data to support a reasonably based doubt of continued majority support."[14]

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12. *Orion Corporation*, 210 NLRB 633 (1974).

13. *Gulfmont Hotel*, 362 F.2d at 589 (emphasis supplied).

14. *Terrell Machine Company v. N.L.R.B.*, 427 F.2d at 1090 (emphasis supplied).

I realize that Ms. Kroft gave a more detailed account of the matters which she said that she related to Ms. Fitzgerald than the account which Ms. Fitzgerald gave. However, I do not find it unusual for Ms. Kroft to recall more of what she herself said in these circumstances, and I do not find the versions to be conflicting. Therefore, I have also accepted Ms. Kroft's testimony as to the matters she related to Ms. Fitzgerald concerning the factors relied upon for withdrawing recognition. The case does not turn so much on credibility resolutions among the witnesses, but instead the case turns more on the legal effects and legal

sufficiency under Board law of the factors which Ms. Fitzgerald relied upon.

The first factor relied upon by Ms. Fitzgerald in deciding to withdraw recognition from the Union was the fact that no grievances had been filed at any time against the Respondent. This was the most important factor to her, and she described it as ". . . the biggest thing."[11] While I find that the Union did not, in fact, file any grievances against the Respondent, the evidence does not establish that any grievances existed at any time. Ms. Tidwell testified with regard to the frequency with which she visited the Respondent's premises and the fact that no employee requested her to file a grievance. Her testimony was not contradicted on those points, and I credit it. In *North American Manufacturing Company,* 224 NLRB No. 172 (1976), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD, page 14:

> And Respondent's showing regarding grievance activity here likewise has no persuasive force insofar as the question of the Union continued representative status is concerned. Among other things, Respondent has not demonstrated that grievances existed and were unprocessed by the Union, nor even that the Union was lax in carrying out its obligations in this regard.

In *A. W. Thompson, Inc.,* 216 NLRB No. 134 (1975), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD page 5:

> As a second affirmative defense, the Respondent argues that, notwithstanding that Article III of the Work-

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11. Although I shall discuss these factors individually, I have considered them collectively in reaching the ultimate conclusion on this issue.

> ing Agreement provides for grievance procedure, no grievances were ever processed with the Respondent by Local 826 or any representative of Local 826.
>
> This fact, also, is unrefuted, the evidence reflecting that, during the contract period, no grievances were filed, and, accordingly, none was processed. It also appears that nothing of any moment occurred giving rise to the use of the grievance machinery, for, as Thompson testified, he could recall nothing happening which would have caused employees to be dissatisfied with their working conditions, that nothing came to his attention concerning problems with employees registering complaints.

I find the foregoing findings applicable here. Although the two newspaper articles in the *Nevada State Journal* headlined the opinion of International Trustee Bramlet that working conditions were "undesirable" and "archaic" in the Reno and Lake Tahoe area, that opinion was expressed in general terms and not specifically at the Respondent's working conditions. Thus, I do not find that the newspaper articles show that this particular Respondent's working conditions were either "undesirable" or "archaic," or in any way warranting the filing of grievances. The failure to file grievances in the circumstances presented here does not show that the Union had abandoned the employees of the Respondent. To the contrary, Ms. Tidwell's testimony shows the frequency of her visits as the Union's business agent to the Respondent's premises.

As her second reason, Ms. Fitzgerald mentioned the fact that the State of Nevada has a right-to-work law. That fact is not disputed, but it simply means that employees have the free choice to decide whether to join, or not to join, a union. Even if a majority chose not to become members of the Union in the circumstances of this case, the Board has

stated: "Similarly, the Board, with court approval, has held that a showing that less than a majority of the employees in the unit are members of the union is not the equivalent of showing lack of majority support. The reason is substantially the same as that regarding the checkoff figures, namely, that no one can know how many employees who favor union representation do not become or remain members of the Union." *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651, at page 652, (1974), citing *N.L.R.B. v. Gulfmont Hotel,* 362 F.2d 588 at page 591 (C.A. 5, 1966). In a similar vein, the Charging Party's attorney cites in his brief, *inter alia,* another case which arose in another state with a right-to-work law, where the Board said: "It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members." *Wald Transfer & Storage Co.,* 218 NLRB No. 73 (1975) at slip opinion page 2, citing *Terrell Machine* and *Gulfmont Hotel.* I find that the *Bartenders, Gulfmont* and *Wald Transfer* rationale to be equally applicable here.

A third factor relied upon by Ms. Fitzgerald involves her reading of the two newspaper articles which appeared in the *Nevada State Journal* on August 20 and 22, 1974. She pointed to the fact that a person whose name was new to her was appointed as the International Trustee of the Union and assumed from the trusteeship that the Union was financially embarrassed. However, she was aware that the Union's officers had changed in the past, and the assump-

tion about the Union's financial condition was a subjective reaction based on what she thought a trusteeship meant. A more objective fact in one of the newspaper articles is the percentage of employees organized by the Union after 2½ months of its organizing campaign. Ms. Fitzgerald arithmetically concluded that the Union had less than 10 percent before its campaign since it claimed that it had doubled its membership, but still had less than 20 percent organized. However, the percentages covered the entire Reno and Lake Tahoe areas and were not limited to the Respondent's bar and culinary employees. It is a reasonable inference to draw that the Union's organizing campaign was directed at employees who were not covered by a collective-bargaining agreement as well as employees who were covered by a union contract, but who had chosen not to join the Union. Thus, the percentages would include those places in the Reno and Lake Tahoe areas where the Union did not have a contract with an employer.

Another factor cited by Ms. Fitzgerald was that no employees had requested representation. She did not define exactly what she meant by that, and it could mean that no employee had requested the Union to represent them in a grievance against the Respondent or that no employee told Ms. Fitzgerald that the employee desired to be represented by the Union. I have previously discussed the matter concerning the absence of grievances against the Respondent, and Ms. Fitzgerald said that the Respondent did not ask its employees whether or not they belonged to the Union. It would not be incumbent on the employees to come forward and inform the Respondent of their union desires.

Ms. Fitzgerald also gave as a factor the fact that there had not been an election. The Board in *White Castle System, Inc.*, 224 NLRB No. 153 (1976), adopted the findings

and conclusions of the Administrative Law Judge in that case who said at slip opinion, ALJD page 3: "I agree with General Counsel that the fact that no election had ever been held is not a valid consideration on which to predicate a doubt of majority status. It must be presumed that when recognition was granted Respondent acted lawfully and recognized a majority union."

The amount of turnover among the bar and culinary employees of the Respondent during the years 1972, 1973 and 1974 was also stated by Ms. Fitzgerald as a factor in her decision. Ms. Fitzgerald relied not only upon what Ms. Kroft told her, but also on her own awareness of the turnover at the Respondent's business. She acknowledged that turnover in prior years had been large and that turnover in the gaming industry generally was high, so the fact that there was a substantial turnover of employees in that particular 3-year period does not seem to be unusual in these particular circumstances. Nevertheless, I accept and credit Ms. Kroft's testimony that she told Ms. Fitzgerald that the turnover of employees in 1972, 1973 and 1974 was over 100 percent. Nevertheless, the Board has stated with regard to the turnover of unit employees:

> Finally, Respondent relied on the turnover of employees to support its belief that the Union had lost majority support. This argument must also be rejected. The Board has ruled, with court approval, that turnover among employees cannot, by itself, be used as a basis for belief that a union has lost majority support since it is presumed that, absent evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced.[11] Here, there is no independent evidence

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11. *Laystrom Manufacturing Co.*, 151 NLRB 1482 (1965); *Washington Manor Inc., doing business as Washington Manor Nursing Center (South)*, 211 NLRB 313 (1974).

from which it may be inferred that Respondent's new employees did not want the Union to represent them. Therefore, given our findings above, the turnover of employees cannot, by itself, be used as a basis for belief that the Union had lost majority support.

*Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB No. 197, slip opinion pages 6 and 7 (1976). See also: *Burns International Security Services, Inc.,* 225 NLRB No. 40 (1976); *A. W. Thompson, Inc.,* 216 NLRB No. 134 (1975); *Strange and Lindsey Beverages, Inc.,* 219 NLRB No. 190 (1975).

I have considered the Board's decision and the Board's discussion of the employee turnover in *Peoples Gas System, Inc.,* 214 NLRB No. 141 (1974). The attorney for the Respondent cites that case, among others, in his brief with regard to several factors. However, the facts in that case involving the change in the composition of the bargaining unit, the strike and the permanent strike replacements, the acquisition of another business where the employees were unrepresented, and the Union's concession in that case that none of the newly acquired employees had signed union authorization and dues checkoff cards are so substantially different from the facts in this case that it is not controlling as a precedent here.

In his brief, the Respondent's attorney urges as being "particularly significant" the recent opinion of the United States Court of Appeals for the Seventh Circuit in *Star Manufacturing Company, Division of Star Forge, Inc. v. N.L.R.B.,* decided on June 25, 1976, 92 LRRM 3179. Among several factors set forth therein, the large turnover of employees was one factor relied upon by the employer for withdrawing recognition. The Court agreed with the views set forth in the dissenting opinion of Chairman Betty

Southard Murphy and stated: "We adopt her well reasoned dissenting opinion as the opinion of this court." The Board's decision is reported at 220 NLRB No. 76 (1975). There are some factual distinctions between the *Star Manufacturing* case and the instant case, but it is not necessary to analyze those distinctions because it is Board precedent which is controlling and which is being applied here.

Still another factor mentioned by Ms. Fitzgerald were rumors and radio announcements which were not specified as to content. Thus, this factor is too vague.

Ms. Fitzgerald also cited as a factor in her decision the conversations which she had with Ms. Kroft and Chef Seth. In addition to discussing employee turnover, Ms. Kroft also informed Ms. Fitzgerald of three employees who had told her that they were not interested in the Union. Seth had said that he knew of only two employees who were members of the Union and gave his opinion that others were not union members. With regard to the three employees who spoke to Ms. Kroft, it should be noted that there were 105 or 106 employees in the unit. The Board has observed: "This 'disaffection', numbering less than 5 percent of the employees in the unit, hardly constitutes a sufficient objective consideration warranting a refusal to bargain." *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatella, Idaho,* 213 NLRB 651 at page 653 (1974). See also the Board's comment in *Strange and Lindsey Beverages, Inc.,* 219 NLRB No. 190, slip opinion pages 4 and 5, (1975); "Furthermore, even assuming that the statements constitute expression of employee dissatisfaction with the Union as their collective-bargaining representative, according to Respondent's evidence, less than one-third of the employees in the bargaining unit made such statements." Thus, the small percentage of the em-

ployees expressing a lack of interest in the Union to Ms. Kroft is to be considered in evaluating that evidence. Counsel for the General Counsel argues in her brief that the Respondent may not rely on statements by one employee as to the other employees' sentiments about the Union and cites *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB No. 197 (1976). In that case, the Board stated at slip opinion page 6:

> The employee statements are some indication of employee dissatisfaction. However, they are entitled to little weight to the extent they purport to convey the sentiments of employees other than themselves. Otherwise, a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority. Since those who expressed antiunion sentiments were few in number, we conclude the Respondent could not rely heavily on these expressions in refusing to bargain.

With regard to the comments made by Seth regarding the two union members, it has been previously discussed that under Board precedent the number of union members does not necessarily indicate the number of employees who support the Union and, furthermore, the fact that Seth only knew of two union members does not establish that other employees might have been union members without Seth knowing of their membership. Counsel for the General Counsel argues in her brief that the rationale of *United Aircraft Corporation,* 168 NLRB 480 (1967) should be applied to statements by supervisors regarding the sentiments of employees. In that case, the Board adopted the findings and conclusions of an Administrative Law Judge who held at TXD page 486:

> Of prime importance is the fact that evidence of dissatisfaction with a collective-bargaining agent duly

selected and long accepted and utilized as the means for obtaining successive improvements in conditions of employment must properly come from the employees themselves, if it is to carry any weight, and not from the employer on their behalf.

The Respondent's attorney properly urges in his brief that the factors have to be considered together rather than as isolated factors. However, after considering the Board and court precedents cited above and applying them to the factors, considered together, which were relied upon by Ms. Fitzgerald in this case, I conclude that the Respondent has not rebutted the General Counsel's *prima facie* case by showing that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time that the Respondent withdrew recognition from the Union.

Finally, turning now to the Respondent's other defense which it may raise under *Terrell Machine* and the other cases cited previously, there is no evidence on this record which establishes that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union and by refusing to bargain with the Union on December 20, 1974.

## IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent set forth in Section III, above, occurring in connection with the operations described in Section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes bur-

dening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

## V. *Conclusions of Law*

1. Nevada Club, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel-Motel-Restaurant Employees & Bartenders Union Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

4. At all times material herein, the Union has been, and is, the exclusive representative of all employees in the above-described appropriate unit for the purposes of collective bargaining.

5. By withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit described above, concerning the wages, hours, working conditions and other terms and conditions of employment of the employees in the unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## VI. *The Remedy*

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[12]

## ORDER

The Respondent, Nevada Club, Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below; with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of

12. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Recognize and, upon request, bargain collectively with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

All employees employed by the Respondent in its bar and and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached Notice marked "Appendix."[13] Copies of the notice on forms provided by the Regional Director for Region 20 after being duly signed by an authorized representative of the Respondent, shall be posted by the Re-

13. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

spondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: August 16, 1976.

ROGER B. HOLMES
Roger B. Holmes
*Administrative Law Judge*

(SEAL) NOTICE TO EMPLOYEES (SEAL)

Posted by Order of the
National Labor Relations Board
*An Agency of the United States Government*

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to post this Notice.

WE WILL recognize and, upon request, bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and if an understanding is reached, embody such understanding in a signed agreement. The

unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Employer in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

WE WILL NOT refuse or fail to do the foregoing and WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

NEVADA CLUB, INC.
(Employer)

Dated..... By.....
(Representative) (Title)

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THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Building, Box 36047, 450 Golden Gate Avenue, San Francisco, California, 94402. Area Code (415) 556-0335.

Received Jun 6 1977

Severson, Werson, Berke & Melchior

*United States of America*
*Before the National Labor Relations Board*

Cases 20—CA—9803—2,
20—CA—9853—2,
20—CA—9869—2,
20—CA—9897—2, and
20—CA—9905—2

FINALLY, INC., d/b/a PALACE CLUB[1]

and

HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

## DECISION AND ORDER

On August 19, 1976, Administrative Law Judge Roger B. Holmes issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the Charging Party filed a brief in answer to Respondent's exceptions, and the General Counsel filed a letter in opposition to Respondent's exceptions and a brief in support of the Administrative Law Judge's Decision.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has

1. The name of Respondent appears as amended at the hearing.

2. Respondent's request for oral argument is hereby denied, as the record, including the briefs, adequately presents the issues and the positions of the parties.

decided to affirm the rulings,[3] findings,[4] and conclusions of

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3. In support of its alternative defense that the Union did not, in fact, enjoy majority status on December 20, 1974, when recognition was withdrawn, Respondent asserts in its brief that it should have been permitted to adduce testimony from Business Representative Howard Lawrence regarding the existence of union business records demonstrating that as of that date the Union represented a majority of the employees employed by Respondent. We find no merit in this contention, as it is well established that particularly where, as here, union membership was voluntary such records are irrelevant to a determination of whether a majority of employees desired union representation. *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 491 (C.A. 2, 1975).

In further support of its alternative defense, Respondent asserts in its brief that it should have been permitted to adduce testimony from Field Examiner David Sargent of Region 20 concerning his alleged review of the Union's business records. Respondent contends that it also sought to question Field Examiner Sargent with respect to his alleged statement to Respondent's counsel in May 1975 that the unfair labor practice charge against Respondent would be dismissed. At the hearing, the Administrative Law Judge revoked the subpena on Field Examiner Sargent after the General Counsel had refused Respondent's request, which was made pursuant to Sec. 102.118 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, for permission for Sargent to testify. The General Counsel based his refusal on the ground that "the highly sensitive and delicate role of the Board agent in investigating and resolving unfair labor practice charges would be seriously impaired if a real likelihood existed of the Board agent's becoming enmeshed as a material witness in cases to which he has been assigned."

It is thus clear that the General Counsel sought to invoke the "limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB." *Stephens Produce Co., Inc., and Temple Stephens Company v. N.L.R.B.*, 515 F.2d 1373, 1376 (C.A. 8, 1975). We are satisfied that the testimony sought by Respondent fell within the privilege and that Respondent has shown no substantial reason to disregard it. Indeed, union business records are wholly irrelevant to the issue raised by Respondent's defense, *Retired Persons, supra,* and, as the Administrative Law Judge stated on the record, any remark Board Agent Sargent may have made to Respondent's counsel concerning the anticipated dismissal of the instant unfair labor practice charge is irrelevant to any issue in this proceeding because the General Counsel did, in fact, issue a complaint. Accordingly, we conclude that the Administrative Law Judge properly revoked the subpena on Field Examiner Sargent.

4. For the reasons set forth in *Nevada Lodge*, 227 NLRB No. 73 (1976), we find no merit in Respondent's contention that jurisdiction should not be asserted herein.

the Administrative Law Judge and to adopt his recommended Order.

1. For the reasons set forth in *Tahoe Nugget,*[5] we agree with the Administrative Law Judge that the presumption of majority status arising from Respondent's voluntary recognition of the Union as the exclusive collective-bargaining representative of its employees continued after its withdrawal from the multiemployer unit.

2. For the reasons stated in his Decision, we agree with the Administrative Law Judge's finding that Respondent failed to establish by a showing of objective facts that it had a reasonable doubt as to the Union's continuing majority status on December 20, 1974, when it withdrew recognition. Accordingly, we shall adopt his recommended Order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Finally, Inc. d/b/a Palace Club, Reno, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

Dated, Washington, D.C. June 2, 1977

.....

Howard Jenkins, Jr., Member

.....

John A. Penello, Member

.....

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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5. *Tahoe Nugget, Inc. d/b/a Jin Kelley's Tahoe Nugget,* 227 NLRB No. 72 (1976).

*United States of America*
*Before the National Labor Relations Board*
*Division of Judges*
*Branch Office*
*San Francisco, California*

Cases 20—CA—9803—2
20—CA—9853—2
20—CA—9869—2
20—CA—9897—2
20—CA—9905—2

FINALLY, INC., d/b/a PALACE CLUB
and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO

*Patricia S. Radez, Atty.*, San Francisco, Calif. for the General Counsel.

*Geoffrey V. White* of *Davis, Cowell & Bowe*, San Francisco, Calif., and *Howard Lawrence* of Reno, Nev., for the Charging Party.

*William W. Wertz* of *Severson, Werson, Berke & Melchior*, San Francisco, Calif. for the Respondent.

## DECISION

### *Statement of the Case*

ROGER B. HOLMES, Administrative Law Judge: The original charge in Case 20-CA-9803 was filed on December 16, 1974, by Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, herein called the Union. That charge was amended seven times thereafter by the Union on various dates, the last date being June 2,

1975. The original charge in Case 20-CA-9853 was filed on January 10, 1975, by the Union and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9869 was filed on January 16, 1975, by the Union and a first amended charge in that case was filed on June 17, 1975, by the Union. The original charge in Case 20-CA-9897 was filed on January 23, 1975, by the Union and a first amended charge in that case was filed on June 17, 1975 by the Union. The original charge in Case 20-CA-9905 was filed on January 27, 1975, by the Union and a first amended charge in that case was filed on May 7, 1975, by the Union and a second amended charge in that case was filed on June 25, 1975, by the Union.

An Order Consolidating Cases, consolidated complaint and notice of hearing was issued on August 27, 1975, on behalf of the General Counsel of the National Labor Relations Board, herein called the Board, by the Regional Director of Region 20 of the Board. That document, *inter alia,* consolidated the foregoing charges and various other charges, and on September 18, 1975, the Regional Director for Region 20 of the Board issued an Order Granting Severance of Respondents as to certain named respondents. Thereafter, the Regional Director for Region 20 of the Board issued on October 1, 1975, an amended consolidated complaint and notice of hearing involving the charges set forth above. The amended consolidated complaint alleges that Finally, Inc., d/b/a Palace Club,[1] herein called the Respondent, has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act, herein called the Act. The Respondent filed answers to the consolidated complaint and the amended

1. The name of the Respondent appears as corrected at the trial.

consolidated complaint and denied, *inter alia,* the commission of the alleged unfair labor practices.

The trial was held before me on May 28 and June 1, 2 and 3, 1976, at Reno, Nevada. Briefs were timely filed by August 10, 1976, by the General Counsel, by the Charging Party, and by the Respondent and have been duly considered.

This matter was heard on a calendar call basis with another matter, *Nevada Club, Inc.,* which was scheduled to be the first case and which was tried immediately preceding this trial. Inasmuch as the *Nevada Club* matter had the identical case numbers as this proceeding, I advised the parties at the outset of that trial that I was adding a suffix -1 to the case numbers involving the *Nevada Club* and adding a suffix -2 to the case numbers involving the Respondent herein. This was done merely for purposes of clarity since these are two separate proceedings involving two separate respondents. The Decision in *Nevada Club, Inc.,* issued on August 16, 1976 as JD-(SF)-184-76. Some of the issues raised in this proceeding are similar to some of the issues which were present in the *Nevada Club* case and, therefore, reference has been made several times herein to that Decision.

Upon the entire record[2] and based upon my observation of the demeanor of the witnesses, I make the following:

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2. There are some inadvertent clerical errors in the transcript, but they can be recognized as such without a detailed correction of the record. However, two of them need to be corrected to avoid confusion. At page 274, line 13, the year which I stated should read "1974" rather than "1975," so that the date is corrected to read "December 11, 1974." At page 296, line 20, I stated "original records," rather than "Regional records" as shown in the transcript. Accordingly, I hereby correct those two inadvertent errors in the transcript.

## *Findings of Fact*

### I. *Jurisdiction*

The Respondent is a corporation engaged in the operation of a restaurant, bar and casino in Reno, Nevada. During 1974, the Respondent received gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $10,000 which originated outside the State of Nevada.

While the Respondent admits the foregoing factual allegations, it contends that the Board should not assert jurisdiction over the Respondent and points to the state regulation of the gaming industry in Nevada. A similar issue is discussed in the *Nevada Club* Decision and I am following the same rationale and Board precedents here. Based on the Board Decisions in *El Dorado Inc., et al.,* 151 NLRB 579, (1965) and *Grand Resorts, Inc.,* 221 NLRB No. 121 (1975), and the foregoing facts pertaining to this Respondent's business operations, I find that the Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. *The Labor Organization Involved*

The parties stipulated that at all times material herein, the Union has existed for the purpose of representing employees in collective bargaining with employers regarding the terms and conditions of employment of those employees, and that at all times material herein, the Union has represented employees in collective bargaining with employers for the terms and conditions of employment of those employees. The parties additionally stipulated that the Union has represented employees who are members of the union for purposes of collective bargaining with employers over terms and conditions of employment of those employee members of the Union.

After considering the foregoing stipulations by the parties and after considering the entire record herein, I find that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

## III. *The Alleged Unfair Labor Practices*

### A. *The Issues*

The principal issues presented in this proceeding are:

1. Whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multiemployer contract, after the Respondent timely withdrew from the multiemployer unit?

If the answer to the foregoing question is in the affirmative, then we reach the second issue, which is:

2. Whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974, or,

(a) Whether the Respondent has shown that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status, or,

(b) Whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

### B. *The Background*

The following facts in this section are based on admissions in the pleadings, stipulations of the parties, and documentary evidence:

The Reno Employers Council, herein called the Council, is a Nevada corporation with an office located in Reno, Nevada, and at all times material herein, has been a voluntary association of employers engaged in the hotel, casino and restaurant industry and other industries. At all times material herein, the Council has existed for the purpose, *inter alia,* of representing its employer-members in collective bargaining and negotiating and administering collective-bargaining agreements in behalf of its employer-members with various labor organizations, including the Union herein. The Respondent joined the Council on or about 1969 and since on or about that time the Respondent has been represented for purposes of collective bargaining by the Council.[3]

Since 1956, the Union and the Council, on behalf of its employer-members, have been parties to a series of multiemployer collective-bargaining unit, the most recent of which agreements was effective from February 16, 1972, through February 15, 1975. However, the Respondent was not a party as a Council member to a multiemployer bargaining agreement or a member of the Council prior to since on or about 1969. On or about December 11, 1974, the Respondent timely withdrew its membership from the Council.

The parties also stipulated that in 1968 the Bartenders Union, Local 86, and the Culinary and Hotel Service Union, Local 45, merged to form the Charging Party herein.

All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the pur-

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3. Silvio Petricciani, president of the Respondent, however, said that the Respondent joined the Council in 1965 at one point in his testimony and in 1968 at another point.

poses of collective bargaining within the meaning of Section 9(b) of the Act.

Two collective-bargaining agreements between the Council, for and on behalf of its employer-members, which included the Respondent, and the Union were introduced in evidence. Those two contracts have effective dates of February 16, 1969, through February 15, 1972, and February 16, 1972, through February 15, 1975. Four other collective-bargaining agreements between the Council and the Union were introduced in evidence, but those agreements do not show the Respondent as being a party to the agreements. Those contracts run consecutively from August 15, 1956, through February 15, 1969.

Article I of the most recent collective-bargaining agreement between the Council and the Union reads as follows:

> ARTICLE I
> JURISDICTION
>
> The Employer agrees that at all times during the period this contract is in full force and effect, to recognize the Union as the sole collective bargaining agency for the employees who are working under the Union's jurisdiction in the classifications listed herein. This contract shall cover all working conditions, wages and hours of the employees and shall be binding upon both the employees and the Employers of all establishments hereinafter mentioned.

### C. *The Correspondence*

On November 15, 1974, a letter was sent from the Union to the Council in which the Union gave notice of its desire to change and modify the terms and conditions of the collective-bargaining agreement for the period following February 16, 1975. The letter asked that the Council communicate with Al Bramlet, international trustee, to arrange

for collective-bargaining negotiations. On the same date, a separate letter was sent from the Union to the Respondent and in substance conveyed the same information to the Respondent.

On December 11, 1974, the Respondent sent a letter to the Council in which the Respondent withdrew its authorization from the Council and Clinton G. Knoll as general manager of the Council, to represent the Respondent in connection with collective bargaining or labor relations matters. The letter also states that a copy of that communication was being sent to the Union. On the same date, the Respondent also sent a letter to the Union in which the Respondent said that it was enclosing a copy of its letter to the Council and also gave notice by the Respondent of termination of the collective-bargaining agreement as of the end of its term.

On December 12, 1974, the Council sent a letter to the Union in which the Council acknowledged receipt of the Union's letter dated November 15, 1974, and in which the Council advised that the Council was not authorized to represent any of the signators to the agreement for collective-bargaining purposes. The letter expressed the understanding that all of the signators to the agreement had already advised the Union of that fact.

On December 12, 1974, the Council also sent a letter to the Union and gave notice of the termination of the collective-bargaining agreement as of the end of the day on February 15, 1975.

On December 13, 1974, the attorney for the Union sent a letter to the Council in which the Union said that no response had been received to the Union's letter dated November 15, 1974, and advised that refusal to bargain charges would be filed with the Board without further

notice unless the Council immediately contacted Bramlet. On the same date, the attorney for the Union sent a separate letter to the Respondent and conveyed to the Respondent the substance of the contents of its letter to the Council.

On December 17, 1974, the attorney for the Union sent a letter to the Council with carbon copies to certain employers, including the Respondent in this case. The letter asserted that the Council and its clients were notified on November 15 of the Union's reopener demand and that the contract termination notice from the Council was, therefore, meaningless. The Union advised that the Union had filed unfair labor practice charges with the Board alleging a refusal to bargain, and advised that, contrary to the Council's letter of December 12, certain establishments, including the Respondent, had not individually notified the Union of their withdrawal of authorization from the Council.

On December 20, 1974, the attorney for the Respondent and certain other employers sent the following letter to the Union:

> This is in reply to the recent letter from your attorney to the following whom we represent:
>
> Nevada Club
> Palace Club
> Ponderosa
> Reno Nugget
> Silver Spur
> Sparks Nugget
>
> As you are aware from letters recently sent you from each of them and from the Reno Employers Council, each of our clients has timely withdrawn from the multi-employer group and each is handling its own collective bargaining. The bargaining unit, therefore, is entirely different as far as each of our clients is concerned.

Although it is not clear from your attorney's letters as to what unit you are claiming or whether you claim to represent a majority of each of our clients' employees in an appropriate unit, we will treat his letter as though he has on your behalf requested bargaining in a unit consisting of culinary and bartender employees in each of the named establishments.

Pursuant to instructions from each of our clients, on behalf of each of them individually, we hereby inform you that each individually has a genuine doubt that your Local continues to represent an uncoerced majority of their respective employees in an appropriate unit. If following a validly conducted election in an appropriate unit under the aegis of the National Labor Relations Board, your Local should be selected as the bargaining agent, our clients individually will at such time fulfill whatever legal obligation they may individually then have.

Should your Local file a petition with the Board for an election, each of our clients, individually, will cooperate looking toward an election under the Labor Management Relations Act, 1947, as amended and the Board's applicable Rules and Regulations.

D. *The Factors Relied Upon by Silvio Petricciani for Withdrawing Recognition From the Union*

Silvio Petricciani has been president of the Respondent since the business was incorporated on April 1, 1964. The Respondent leased the Palace Club premises from the Palace Corporation which owned the building and began operation of the club on June 10, 1964. The club had been operated from 1943 to June 10, 1964, by a partnership in which Petricciani had no interest. At the time that the Respondent began operation of the club, it assumed the collective-bargaining agreement which had been in effect when the partnership operated the club. The collective-bargain-

ing agreement was between the Independent Tavern Owners Association of Northern Nevada on behalf of its employer-members and the predecessors to the Charging Party. Petricciani testified that he had never signed since June 10, 1964, a contract with the Union on an individual employer basis.[4] He said that the Respondent joined the Reno Employers Council in 1965 at one point in his testimony and in 1968 at another point.

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4. Marie Tidwell, who has been business agent of the Union since 1966, was asked whether the Respondent was an independent party to a collective-bargaining agreement. Ms. Tidwell candidly answered: "I am not sure if they were multi or independent. I just know they had a contract. I am not sure if they were multi or not." Dan Basta, who was secretary of the Union from 1962 until 1969, testified that the Union had an independent contract with the Respondent which had been signed either by Petricciani or by Sam Delich, who is the brother-in-law of Petricciani and was secretary-treasurer of the Respondent in June 1964. A letter from Basta to the Independent Restaurant and Tavern Insurance Fund dated June 18, 1964, was received in evidence. It lists two companies as having "signed agreements," but does not describe what the agreements were. Howard Lawrence, who is presently the business representative, assistant to the international trustee and chief executive officer of the Union, searched the Union's files, but he could not locate any contract with the Respondent. However, he located a Xerox copy of a list of the names of 50 employers, one of which is the Respondent listed under "agreements signed with independent owners."

In view of the fact that no one could produce a signed contract with the Respondent for the period prior to 1969, I have examined the secondary evidence on this issue and conclude that it does not establish the fact that the Respondent had an individual contract with the Union. Petricciani testified positively and definitely that he assumed the collective-bargaining agreement then existing between the former partnership and the Union at the time that the Respondent took over operation of the club. In contrast, Basta was attempting to recall a document which he says was signed 12 years ago and which he had not seen for at least 8 years. The document, if there was ever one in existence, would not have had any particular significance to Basta 12 years ago so that it would remain in his memory—at least he did not make such a claim. The other secondary evidence does not overcome Petricciani's positive testimony on this point.

As president of the corporation, Petricciani said that he worked 7 days a week for 9 or 10 hours each day at the club and took 1 week off from work about every 3 months.

Petricciani made the decision to withdraw recognition from the Union and the withdrawal of recognition took place on December 20, 1974, when the Respondent's attorney wrote a letter to the Union to that effect. Petricciani gave the following factors as reasons why he decided to withdraw recognition from the Union:

> Number one, we had newspaper articles which gave me the insight of the fact that ten percent of the people that were organizing in the Reno, Sparks, Lake Tahoe area, number two, there was a concentrated drive to organize in the area, number three, the fact that Mr. Bramlet had been appointed the trustee for Reno Local 86, number four, we had no check-off list, number five, there was no indication whatsoever in the contract that we had to employ union people, number six, after reading the newspaper articles, it came to my attention that with all of this turnover, which I also became concerned about because of the unemployment compensation contributions, that there were no grievances filed whatsoever in my establishment.
>
> Mr. Bramlet alleged in his newspaper articles that here we have archaic working conditions, people dissatisfied with the way they are treated, and so forth, and that in all my tenure at the Palace Club, we have never had a grievance filed as to those conditions.
>
> Then we go onto the fact that there has never been an NLRB election with the Palace Club, so consequently, this led me to believe, plus the fact that it is a right to work state, that the Union did not represent a majority of my people.
>
> • • •
>
> Another thing that effected my decision were the reports that I got back from Mr. Stevens and Mr.

Quilici and some of the other employees who had come to me voluntarily and talked to me about Local 86.

The first three factors mentioned by Petricciani have reference to two newspaper articles which appeared in the *Nevada State Journal* newspaper in Reno and which were read by Petricciani. The first of the two articles appeared on August 20, 1974. It reads as follows:

Culinary Employees' Working Conditions
Called Undesirable

Culinary employees' working conditions in Northern Nevada are hardly desirable. Al Bramlet, secretary-treasurer for Culinary Local 226 in Las Vegas, charges in this month's edition of "Topics," the local's magazine.

Bramlet was appointed several months ago as international trustee of Local 86 in Reno to organize the general Reno and Lake Tahoe areas.

Culinary employees in Northern Nevada are working under conditions their Southern Nevada counterparts "suffered under 20 years ago." Bramlet claims in the magazine article.

He could not be reached Monday for further comment.

The article says:

"Employees are working six days at straight time. No overtime. A team of two maids at one downtown Reno hotel is assigned to prepare 65 rooms per day, plus washing the windows. For this staggering work load, they receive $16 per shift."

The culinary local does not cover all casino personnel. It represents maids, employees in other cleanup capacities, bartenders, cocktail waitresses, restaurant personnel, change girls and booth cashiers.

"Most important and most pathetic is the fact that our co-workers in Reno and Lake Tahoe are scared."

Bramlet said, "They're afraid to report violations of the state's labor laws, afraid to demand overtime, afraid to do anything but blindly obey orders from the boss."

Les Kofoed, director of the Gaming Industry Association of Nevada, declined to comment Monday in response to Bramlet's remarks.

In the article, Bramlet also said employees in Northern Nevada were fired at the discretion of their employer with no avenue for grievance or redress.

He claimed many employees don't receive the two 10-minute work breaks required by state law and that change girls cannot accept tokes under the threat of being fired.

"Almost without exception, the first plea from each worker was for job protection," Bramlet said. "Frankly, I am amazed at what exists in Northern Nevada. It is almost another world for the people in our industry."

Bramlet is scheduled to be in the Reno and Lake Tahoe areas Aug. 22 and 23 to discuss problems with local employee groups.

Clinton Knoll, representative for the Reno Employers' Council, could not be reached for comment Monday.

The article in the *Nevada State Journal* newspaper for August 22, 1974, reads as follows:

Union Leader Cites Growth,
Calls Reno Conditions 'Archaic'

Southern Nevada labor leader Al Bramlett said Wednesday membership in Northern Nevada's Culinary Union has doubled in 2½ months as part of a full-scale campaign to organize Reno and Lake Tahoe food and beverage workers.

Bramlett, recently named international trustee for Local 86, which serves the Reno-Tahoe area, said dues

paying members have grown from about 900 to more than 1,800 since May.

He said he was sent north because the conditions in the Reno-Tahoe area are "archaic" compared with Las Vegas.

He said Reno food and beverage workers have no job security, no benefits, no seniority provisions, and often make more than $10 a shift less than their Las Vegas counterparts.

The union serves bartenders, cooks, any position dealing with the preparation and serving of food and beverages, as well as housekeeping positions, change girls and cashiers.

"Our ultimate objective is to bring to Reno-Tahoe the benefits of a union contract which we enjoy in Southern Nevada," Bramlett said.

"The major obstacle is the resistance of the industry itself, but we are here to stay," he said.

He said, for example, a Reno fry cook who gets $24.17 a shift would get $36.20 in Las Vegas and a bartender making $25.82 in Reno would receive $34.20 in the south.

He said similar disparity exists in many of the jobs covered by the Culinary Workers Union.

Bramlett said the big difference is that Las Vegas is 98 per cent unionized while Reno-Tahoe is less than 20 per cent.

He also said some employers in Northern Nevada have warned their employees to stay out of discussions with union men. He said his business representatives have been watched, followed and harrassed.

He said, however, union strength is growing fast in the north and that the real test will come in November when the northern local contract expires at Lake Tahoe. He said the Reno contracts expire in February and that, by then, he hopes to have many more culinary workers in the area unionized.

Petricciani described the newspaper articles as being the most important factor in his decision. He said that when he read that Bramlet was appointed trustee of the Union it gave him cause for thought. Petricciani explained:

> Number one, being a businessman, when it is either in a will or a business that is faltering or a business that has gone broke then a trustee is appointed to administer the affairs of this business.
>
> So, consequently, I enlisted the knowledge of my personal attorney here in Reno, Mr. William O'Mara, and I also called Mr. Nathan Berke and I said, "What does this mean, for a trustee to be appointed for a Union?"
>
> Mr. Berke and Mr. O'Mara both indicated to me that the Union was in trouble and if the Union was in trouble, specifically, if it was in trouble financially. So, consequently, I said, "If this is the case, they probably do not represent my employees or a majority of my employees."

Petricciani also said that the articles caused him to wonder ". . . why all of a sudden there is a big influx of organizational activity" when prior to that time there had not been any such activity. He also said that he wondered if any of his employees belonged to the Union after he concluded from the figures in the newspaper article that the Union had less than 10 percent of the people organized in the entire Reno-Lake Tahoe area. He explained that the article indicated that the Union had grown to 1800 since May and that the Union had less than 20 percent of the employees organized. If the Union had only 900 employees organized prior to that time, he concluded that the Union had less than 10 percent of the employees organized previously.

Although the newspaper articles indicated Bramlet's opinion that the working conditions in the area were "un-

desirable" and "archaic," Petricciani said that no grievances were filed against the Respondent on those grounds after the newspaper articles had appeared. He stated that two or three, possibly four, grievances had been filed earlier between 1972 and the early summer of 1974.[5]

The fact that there had been no NLRB election in the unit; that Nevada is a right-to-work state; that there was no union security clause in the prior contract, and that there was no union dues-checkoff provision in the prior contract are not in dispute.

The reference to the turnover of employees by Petricciani concerns the study of payroll records which was undertaken during the period after the newspaper articles appeared in August 1974 and into December 1974. Irma Shumate, the payroll clerk, was asked to prepare the information for the years 1972, 1973 and 1974, but Petricciani said that he personally reviewed the payroll documents. His conclusion was that the turnover among his bar and culinary employees was over 100 percent and a little less than 300 percent. He said that there were about 86 culinary employees and about 24 bar employees in the fall of 1974 for a total of about 110 employees. While he said that he did not know how many of the bar and culinary employees were members of the Union in the fall of 1974, he stated that at no time did he believe that the Union represented a majority of his bar and culinary employees.

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5. Two letters from Clinton G. Knoll, general manager of the Reno Employers Council, to an attorney for the Union were received in evidence. One letter is dated January 29, 1973, and refers to a meeting between the two persons on January 16 relating to the issue of holiday overtime pay. The letter indicates that checks for four employees of the Respondent who were underpaid were enclosed. The second letter is dated June 14, 1973, and concerns "a number of grievances" involving five employers. One of the employers listed is the Respondent and the letter indicates that a check is enclosed for one employee for overtime pay on 2 days.

With regard to the restaurant employees of the Respondent, the records show that there were 86 such employees as of February 15, 1972. Of those 86 restaurant employees, the following number were still employed by the Respondent on the dates indicated:

| | |
|---|---|
| February 15, 1973 | 25 employees |
| February 15, 1974 | 15 employees |
| December 20, 1974 | 13 employees |

With regard to the bar employees of the Respondent, the records show that there were 24 such employees as of February 15, 1972. Of those 24 bar employees, the following number were still employed by the Respondent on the dates indicated:

| | |
|---|---|
| February 15, 1973 | 17 employees |
| December 20, 1974 | 10 employees |

In addition to the foregoing factors, Petricciani also testified that he relied upon certain conversations which he had with management persons and with some employees. One of the management persons was William Stevens who was manager of the restaurant at the time. Petricciani estimated that he had about 20 conversations with Stevens regarding the Union between August 20, 1974, and December 11, 1974, and that the substance of the conversations did not differ. Petricciani testified:

> We were discussing as to whether Local 86 really represented any majority of our employees and he indicated to me that it was his feeling that it did not and that our employees were satisfied to be working with us and for us and didn't feel that they needed any third party to represent them. They thought they had an open-door policy in the Palace Club and could come to him or to me anytime they wanted and state any of their problems be they personal or working problems.

Petricciani said that Stevens told him that he was basing his opinion concerning the status of the Union on employees who had talked to him and on conversations which Stevens had overheard.[6]

Another management person with whom Petricciani spoke about the Union was Pete Quilici who was the bar manager. These conversations also took place during the same time period as specified for the conversations with Stevens. Petricciani said that he had about the same number of conversations with Quilici. Petricciani testified:

> Yes, I asked him if in his meanderings again around the bar and the cocktail waitresses what impression he got as to the status of Local 86 with the employees.
>
> He indicated to me that he didn't feel that the employees were too interested in it.

Petricciani said that Quilici told him that he based his impressions on conversations which Quilici had overheard between his bartenders and cocktail waitresses.[7]

Another person with whom Petricciani spoke was Harold Hollinger who was a bartender for the Respondent until sometime during the payroll period which ended on September 15, 1974. The conversation about the Union took place in October 1974. Petricciani described his conversation with Hollinger as follows:

> Sometime in October, he was at the bar as a customer and he said "Mr. Petricciani, I left here of my own volition, my own free will, and I want you to know

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6. Stevens, who was not employed by the Respondent at the time of the trial, also testified with regard to these conversations. His testimony is not substantially different from the testimony given by Petricciani, but I accept Petricciani's version.

7. Quilici also testified at the trial with regard to these conversations and his testimony is not significantly different from the testimony of Petricciani, but I accept Petricciani's version.

that all the time I worked for you I enjoyed working for you. The conditions were good and if you ever have any problems in so far as the Union organization or stuff I will be glad to testify for you."

• • •

Other than he didn't think the Union was doing its job in representing the people, the bartenders community and, he again thought he didn't need them to guard for him in any way, shape, or form.

An employee named Ann Sarlo, who was a waitress at the time, had a conversation in the latter part of August or the first part of September 1974 before the Labor Day holiday with Petricciani. He gave this description of their conversation:

Yes, she said, "Sil—," once again we are on a first name basis.

She said, "I know you are concerned about what is happening around the town, the Union stuff."

She says, "I want you to know you really don't have anything to worry about. All of your employees are loyal to you and they feel that they can come to you with any grievances they may have."

An employee named Robert Casanava, who was a waiter at the time, also had a conversation about the Union with Petricciani during the period between August 20, 1974, and December 11, 1974, which Petricciani also relied upon. Petricciani stated:

He said—of course again we are on a first name basis in the club.

He said, "Sil, I would like to have a talk with you."

I said, "Okay, what is your problem, Bob?"

Bob has come to me many times with his personal problems.

I said, "What can I do to help you?"

He said, "Nothing, maybe I can help you."

I said, "In what way, Bob?"

He said, "Well, this concentrated drive is going on with the Union and so on and so forth and I have been to several of the meetings and my position in the Palace Club here, I don't see where they can help me in any way, shape or form. I am happy with my job. I am happy to be working here and I want you to know that."

Petricciani also stated that Casanava told him that: "His feeling was that the rest of the employees felt the same way."

Still another employee named Bill Kidder spoke with Petricciani about the Union in September 1974. Kidder was a cook at the time of the conversation and later became manager of the restaurant for the Respondent after Stevens left the Respondent's employ. Petricciani stated:

Bill came to me and he said, "Myself and a couple of cooks have been going to the Union meeting down there just to hear what they have to say."

I said, "Down where?"

He said, "At the place on South Virginia Street."

I said, "Fine."

He said, "We have listened to see if they had anything to offer or not and as far as I am concerned we figured it is a bunch of garbage and we never went back."

In weighing the credibility of Petricciani's testimony, I have considered the testimony of Stevens and Quilici, and where there are any differences, I find that the testimony of Petricciani is the complete and accurate account of these events.[8] I have also considered the fact that Petricciani did

8. Hollinger, Sarlo, Casanava and Kidder were not called as witnesses by any party.

not mention some of the foregoing factors in an affidavit which he gave on January 30, 1975, which was about 6 or 7 weeks after the Respondent withdrew recognition from the Union. However, Petricciani gave an explanation for those omissions from his affidavit which was taken based on questions from his attorney and sworn to before Ms. Shumate as a notary public. Petricciani gave this explanation:

> I would have to read the document to see if it contained all the reasons. I would say it contained the majority of the reasons.
>
> At the time that document was prepared, Mr. Wertz came into Reno and I was busy in the Club and trying to give him my affidavit, and there may be many things that we left out of it that I didn't remember.
>
> He would call me on the telephone and I'd have to go upstairs and come back down again. It was a rather hectic day. If I recall, it was right around the New Years or just after.
>
> • • •
>
> Just a moment. I just told you that the date that affidavit was prepared, there were many things in that document that weren't in there that I would like in there. Like I said, it was a very hectic day. I had Mr. Wertz waiting in my office and he would come back, and this and that and the other thing, and it really wasn't a day that we could sit down and talk. He was there on short notice, he grabbed me on short notice. There are a lot of things that weren't discussed in that document.
>
> Maybe we discussed them and Mr. Wertz didn't put them down. I don't know.

Petricciani acknowledged that he did not mention the following factors for withdrawing recognition from the Union in his affidavit of January 30, 1975: his examination of the payroll records; the conversation which he had with

Quilici; the conversations which he had with the employees, and the lack of grievances filed by the Union against the Respondent. Notwithstanding those omissions from his affidavit, I do not believe that Petricciani fabricated them as additional factors to form a basis for withdrawing recognition from the Union. He has given a plausible explanation of why those factors are not in his affidavit. I accept Petricciani's testimony at the trial with regard to the factors which he said that he relied upon in his decision to withdraw recognition from the Union.

### E. *The Respondent's Second Defense*

In addition to its defense that the Respondent had a reasonably based doubt of the Union's majority status, the Respondent urged as another defense that the Union did not, in fact, represent a majority of the Respondent's bar and culinary employees on December 20, 1974, when it withdrew recognition from the Union. In connection with that contention, the Respondent called Howard Lawrence as a witness during the presentation of the Respondent's defense. The Respondent sought to elicit the same information from Lawrence in this proceeding as it attempted to do in the *Nevada Club, Inc.*, proceeding which has been previously referred to. In order to understand the positions of the parties on this issue, it is necessary to recount what took place in the *Nevada Club* case since those positions of the parties and legal arguments were adopted by the parties in this proceeding, but not reiterated in detail on this record.

Lawrence is the business representative, assistant to the international trustee, and chief executive officer of the Union. He began working for the local Union on June 14 or 15, 1974, which was shortly after the local Union was

placed in trusteeship on June 7, 1974. As the ceo of the local Union, Lawrence is the principal custodian of the Union's records. Lawrence testified that the Union maintained membership records on an alphabetical basis. The Respondent's attorney asked Lawrence in the *Nevada Club* proceeding whether there were any other records that the Union had in existence at the time between August 20 and December 20, 1974, which would disclose that the Union represented a majority of the employees employed by the Respondent. A lengthy discussion then ensued which is completely reflected in the *Nevada Club* transcript, but it was not necessary to repeat the discussion on the record in this case. In the *Nevada Club* case, I indicated that I would overrule the objections to a modification of the question by the Respondent's attorney. At page 585 of the transcript in the *Nevada Club* proceeding, I said: "In other words, I will sustain and rule proper your question for Union records, whether the Union has records to show Union majority support as of December 20, 1974." The Respondent's attorney then stated: "Then I will adopt that particular statement by the Administrative Law Judge as my question directed to the witness." Counsel for the General Counsel in the *Nevada Club* case inquired whether the term "Union majority support" indicated Union membership alone. I responded "no"; whereupon counsel for the General Counsel asked: "Your Honor is then indicating any records showing Union members, non-members, adherence, non-adherence, those in favor, those against? Any records showing the totality of the unit, rather than the mere question of whether or not there is members, Union members existing." In response I replied in the affirmative and pointed out that majority support does not mean just members of the Union.

Thereafter in the *Nevada Club* proceeding, the Charging Party exercised its right under the Board's Rules and Regulations to file a request for special permission to appeal that ruling. The General Counsel filed a memorandum in support of the Charging Party's interim appeal, and the Respondent filed a memorandum in opposition. The Board granted the appeal and reversed the ruling. I introduced all of the foregoing documents into the record in the *Nevada Club* proceeding and also in the record in this proceeding as Administrative Law Judge's Exhibits 1 through 5 for purposes of clarity and to preserve the positions taken by all parties, as well as to show the Board's ruling on this matter.

### F. *Analysis and Conclusion*

The threshold question to be determined is whether a rebuttable presumption of majority status existed in favor of the Union in a single-employer unit of the Respondent's employees, based on a multiemployer contract, after the Respondent timely withdrew from the multiemployer unit.[9]

In *Terrell Machine Company,* 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), the Board stated:

> It is well settled that a certified union, upon expiration of the first year following its certification, enjoys a rebuttable presumption that its majority representative status continues.[1] This presumption is designed to promote stability in collective-bargaining relationships, without impairing the free choice of employees.[2]

1. *Celanese Corporation of America,* 95 NLRB 664, 671-672.

2. *Id.*

9. The discussion which follows with regard to this first issue is substantially the same as the discussion in the *Nevada Club, Inc.,* Decision previously referred to.

> Accordingly, once the presumption is shown to be operative, a *prima facie* case is established that an employer is obligated to bargain and that its refusal to do so would be unlawful.

In the present case the Union has not been certified by the Board as the bargaining representative in either the multi-employer unit or the single-employer unit. Nevertheless, the Board has applied the principles set forth in the *Terrell Machine* case whether the union has been certified by the Board or recognized as the bargaining representative. In *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651 (1974), the Board stated:

> The above principles set out in *Terrell* are equally applicable whether the union has been certified by the Board, or, as here, recognized as the bargaining representative of the employees by Respondent without Board certification.[3] In the latter situation, existence of a prior contract, lawful on its face, raises a dual presumption of majority—a presumption that the union was the majority representative at the time the contract was executed, and a presumption that its majority continued at least through the life of the contract.[4] Following the expiration of the contract, as here, the presumption continues and, though rebuttable, the burden of rebutting it rests on the party who would do so,[5] here Respondent.

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3. See *Emerson Manufacturing Company, Inc.*, 200 NLRB 148 (1972); *Cantor Bros., Inc.*, 203 NLRB 774 (1973).

4. *Shamrock Dairy, Inc., et al.*, 119 NLRB 998 (1957), and 124 NLRB 494 (1959), enfd. 280 F.2d 665 (C.A.D.C.), cert. denied 364 U.S. 892 (1960).

5. *Barrington Plaza and Tragniew, Inc.*, 185 NLRB 962 (1970), enforcement denied on other grounds *sub nom. N.L.R.B. v. Tragniew, Inc., and Consolidated Hotels of California,* 470 F.2d 669 (C.A. 9, 1972).

In the instant case the Union for a number of years has been the recognized collective-bargaining representative of all of the employees in the multiemployer unit, which has included the bar and culinary employees of the Respondent. The Union has also been a party to a series of consecutive collective-bargaining agreements beginning in 1969 which have covered the bar and culinary employees of the Respondent, together with the employees similarly classified who were employed by other employer-members of the Reno Employers Council. Thus, for the period from 1969, through February 15, 1975, the successive contracts negotiated by the Union and the Council on behalf of the Respondent and other employer-members of the Council, have been applicable to the bar and culinary employees of the Respondent.

Under the *Celanese, Terrell Machine* and *Bartenders* cases referred to above, the Union has enjoyed a "dual presumption of majority." That is, under the Board precedents, the Union is presumed to have been the majority representative of the employees covered by the contract at the time that the contract was executed and further, the Union is presumed to have continued its majority status at least through the life of the contract. Even after the expiration of the contract, the rebuttable presumption of majority status continues in favor of the Union under Board law. Thus, the legal presumption of the majority status of the Union was operative in the multiemployer unit at the times material herein, and I conclude that the legal presumption also operates in favor of the Union's majority status among the bar and culinary employees of the Respondent who were a part of that larger unit. To hold otherwise would conflict with the Board's policy as stated in *Terrell Machine* ". . . to promote stability in collective-bargaining relationships, without impairing the free choice

of employees."[10] If each time an employer withdrew from a multiemployer unit, the presumption of majority status ceased to be operative, then a question concerning representation would automatically arise and stability in collective bargaining would not be achieved.

However, finding that the legal presumption of majority status flowing from the multiemployer collective-bargaining agreement remains operative among the bar and culinary employees of the Respondent who were a part of that unit, is not a conclusive determination of majority status. It is just a legal presumption and nothing more. The presumption is rebuttable and may be overcome in either one of the two ways described by the Board in the *Terrell Machine* case.

I am not unmindful of the Board's comment made in a different context that when an employer or a union withdraws from a multiemployer unit, the union involved may be faced with the possibility of demonstrating its majority status in the individual employer unit. In its landmark Decision, *The Evening News Association, Owner and Publisher of "The Detroit News,"* 154 NLRB 1494 (1965), enfd. 372 F.2d 569 (1967), the Board held that the previously existing rules governing employer withdrawal from multiemployer units should be applied on an equal basis to union withdrawal from such units. In its rationale, the Board stated at page 1499:

> In either case, the withdrawing party forces the other to forego bargaining in the established multiemployer

10. The Board has remarked on stability in industrial relations in *United Supermarkets, Inc.*, 214 NLRB No. 142 (1974), at slip opinion, page 6:

> "Moreover, to require the incumbent union to reestablish its majority support upon demand would necessarily disrupt bargaining relationships, and we have repeatedly emphasized the stabilization in industrial relations is the ultimate objective of all provisions in the Act."

> unit, and in either case, the union may be faced with the possibility of having to demonstrate that it has been designated by a majority of the employees in the individual employer units resulting from the breakup of the multiemployer unit, if it is to retain its status as the bargaining representative of such employees.

The use of the words "may" and "possibility" by the Board in the portion of the Decision quoted above suggests that the Board meant that a union would not be required to demonstrate its majority status in the individual employer unit in every case, but that it may face the possibility of having to do so. An example of such a possibility might be where an employer timely filed an RM petition for an election and that petition was properly supported by the "objective considerations" required by the Board's Decision in *United States Gypsum Company,* 157 NLRB 652 (1966). Another example might be where another labor organization timely filed an RC petition for an election and that petition was properly supported by at least 30 percent of the employees in the individual employer unit. Still another example might be where an RD petition for an election was timely filed and was properly supported by at least 30 percent of the unit employees. In those circumstances, a union might face the possibility of having to demonstrate its majority status in the individual employer unit.

After considering all of the foregoing, the arguments and briefs by the parties, the entire record and the Board law, I conclude that a rebuttable presumption of majority status did exist in favor of the Union on December 20, 1974, in the single-employer unit of the Respondent's bar and culinary employees.

Having made a determination with regard to the first issue, it is now necessary to determine whether the Respondent violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union and refused to bargain with the Union on or about December 20, 1974. To answer that question, we must decide whether the Respondent has shown that it had a reasonably based doubt, which was based upon objective considerations, of the Union's majority status at the time it withdrew recognition, so as to rebut the presumption of the Union's majority status. Secondly, we must also decide whether the Respondent has established that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition, so as to rebut the presumption of the Union's majority status.

At the outset, it should be noted that the withdrawal of recognition in this case took place in a context which was free of any other alleged unfair labor practices.

I have accepted Petricciani's testimony as to the factors on which he said he relied in making his decision to withdraw recognition from the Union. While I shall discuss the factors individually, I have considered them collectively in reaching the ultimate conclusion of whether the Respondent has rebutted the General Counsel's *prima facie* case of the Union's presumed majority status. The Board has made it clear that the Union's presumption of majority status in such circumstances is a rebuttable presumption. The Board has recently reiterated this view in *Burns International Security Services, Inc.*, 225 NLRB No. 40 (1976).

The two newspaper articles which appeared in the *Nevada State Journal* on August 20 and 22, 1974, were cited by Petricciani as being the most important factor in his decision. While it is clear that Petricciani was correct in his

arithmetic regarding the percentages of employees organized by the Union, it must be remembered that the article had reference to a wide area of employees which included both the Reno and Lake Tahoe areas. The figures, of course, were not limited to just the Respondent's club, but would include an area of many employers and employees.

The appointment of a trustee for the Union indicated financial trouble to Petricciani and this belief was confirmed by his two attorneys. Of course, financial difficulty could be attributable to several factors insofar as a labor organization is concerned, but it is not illogical to believe that a decline in members paying dues could cause financial difficulty for a union insofar as revenues are concerned. However, once again, even if the Union was in financial trouble, it does not necessarily mean a loss of members at the Respondent's club since the Union covered both the Reno and Lake Tahoe areas.

Although the newspaper articles referred to Bramlet's opinion that working conditions in Reno and Lake Tahoe were "archaic" and "undesirable," Petricciani correctly pointed out that no grievances were filed against the Respondent during the period after the articles appeared in the newspaper. Nevertheless, the articles did not refer to working conditions specifically at the Respondent's club, but were expressed in general terms. The newspaper articles do not establish that the working conditions at the Respondent's club were either "archaic" or "undesirable," or that the Respondent had any type of working conditions which would warrant the filing of a grievance. In *North American Manufacturing Company,* 224 NLRB No. 172 (1976), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD page 14:

> And Respondent's showing regarding grievance activity here likewise has no persuasive force insofar as the question of the Union's continued representative status is concerned. Among other things, Respondent has not demonstrated that grievances existed and were unprocessed by the Union, nor even that the Union was lax in carrying out its obligations in this regard.

In *A.W. Thompson, Inc.,* 216 NLRB No. 134 (1975), the Board adopted the findings and conclusions of the Administrative Law Judge in that case who stated at slip opinion, ALJD page 5:

> As a second affirmative defense, the Respondent argues that, notwithstanding that Article III of the Working Agreement provides for grievance procedure, no grievances were ever processed with the Respondent by Local 826 or any representative of Local 826.
>
> This fact, also, is unrefuted, the evidence reflecting that, during the contract period, no grievances were filed, and, accordingly, none was processed. It also appears that nothing of any moment occurred giving rise to the use of the grievance machinery, for, as Thompson testified, he could recall nothing happening which would have caused employees to be dissatisfied with their working conditions, that nothing came to his attention concerning problems with employees registering complaints.

I find that the foregoing findings adopted by the Board to be applicable in this case.

Another factor given by Petricciani was that there had been no NLRB election. The Board in *White Castle System, Inc.,* 224 NLRB No. 153 (1976), adopted the findings and conclusions of the Administrative Law Judge in that case who said at slip opinion, ALJD page 3: "I agree with Gen-

eral Counsel that the fact that no election had ever been held is not a valid consideration on which to predicate a doubt of majority status. It must be presumed that when recognition was granted Respondent acted lawfully and recognized a majority union."

Petricciani also cited as factors in his decision that the State of Nevada has a right-to-work law; that there was no union security clause in the prior contract and that there was no dues checkoff provision in the prior contract. None of these facts were contradicted. However, the legal effect of those facts has been considered by the Board. In *Wald Transfer & Storage Co.*, 218 NLRB No. 73 (1975) at slip opinion page 2, citing the Decisions in *Terrell Machine Company*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (C.A. 4, 1970), and *N.L.R.B. v. Gulfmont Hotel*, 362 F.2d 588 (C.A. 5, 1966), the Board stated:

> It has been clearly established that a distinction exists between union membership and union support, foreclosing relying upon one as evidence of the other. Here, union membership being voluntary in this right-to-work State emphasizes that distinction. Many employees while approving of the Union may not choose to give it their financial support *or* participate as members.

The Board has also stated that:

> Similarly, the Board, with court approval, has held that a showing that less than a majority of the employees in the unit are members of the union is not the equivalent of showing lack of majority support. The reason is substantially the same as that regarding the checkoff figures, namely, that no one can know how many employees who favor union representation do not become or remain members of the Union.

*Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651. I find that the *Bartenders, Gulfmont* and *Wald Transfer* rationale to be applicable here. See also the Board's Decision in *Orion Corporation,* 210 NLRB 633 (1974).

The amount of turnover among the bar and culinary employees of the Respondent is still another factor in Petricciani's decision to withdraw recognition from the Union. There can be little question that the turnover among those employees was substantial for the 3-year period examined by Petricciani. Nevertheless, the Board has stated with regard to the turnover of employees:

> Finally, Respondent relied on the turnover of employees to support its belief that the Union has lost majority support. This argument must also be rejected. The Board has ruled, with court approval, that turnover among employees cannot, by itself, be used as a basis for belief that a union has lost majority support since it is presumed that, absent evidence that would justify a contrary conclusion, new employees will support the union in the same ratio as those whom they have replaced.[11] Here, there is no independent evidence from which it may be inferred that Respondent's new employees did not want the Union to represent them. Therefore, given our findings above, the turnover of employees cannot, by itself, be used as a basis for belief that the Union had lost majority support.

*Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB No. 197, slip opinion pages 6 and 7 (1976). See also: *Burns International Security Services, Inc.,* 225 NLRB No. 40 (1976); *A.W.*

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11. *Laystrom Manufacturing Co.,* 151 NLRB 1482 (1965); *Washington Manor Inc., doing business as Washington Manor Nursing Center (South),* 211 NLRB 313 (1974).

*Thompson, Inc.*, 216 NLRB No. 134 (1975); *Strange and Lindsey Beverages, Inc.*, 219 NLRB No. 190 (1975).

I have read and considered the recent opinion of the United States Court of Appeals for the Seventh Circuit in *Star Manufacturing Company, Division of Star Forge, Inc. v. N.L.R.B.*, decided on June 25, 1976, 92 LRRM 3179. Among the several factors set forth therein, the large turnover of employees was one factor relied upon by the employer for withdrawing recognition from the union in that case. The Court agreed with the views set forth in the dissenting opinion of Chairman Betty Southard Murphy and stated: "We adopt her well reasoned dissenting opinion as the opinion of this court." The Board's Decision is reported at 220 NLRB No. 76 (1975). There are some factual distinctions between the *Star Manufacturing* case and the instant case, but it is not necessary to analyze those distinctions because it is Board precedent which is controlling and which is being applied here.

I have also given consideration to the Board's Decision in *Peoples Gas System, Inc.*, 214 NLRB No. 141 (1974). However, the facts in that case are substantially different from the facts herein. For example, with regard to the turnover factor, *Peoples Gas* involved a change in the composition of the bargaining unit, a strike and the permanent strike replacements, the acquisition of another business where the employees there were unrepresented, and the union's concession that none of the newly acquired employees had signed union authorization and dues checkoff cards.

Petricciani also relied upon conversations which he had with two management persons, Stevens and Quilici, former employee Hollinger, and employees Sarlo, Casanava, and Kidder. It must be remembered that the 3 employees who

spoke to Petricciani represent a small percentage of the 110 bar and culinary employees of the Respondent at that point in time. *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Association of Pocatello, Idaho,* 213 NLRB 651 (1974) and *Strange and Lindsey Beverages, Inc.,* 219 NLRB No. 190 (1975).

With regard to the factor of statements made by employees, the Board has held in *Dalewood Rehabilitation Hospital, Inc., d/b/a Golden State Habilitation Convalescent Center,* 224 NLRB No. 197 (1976), at slip opinion page 6:

> The employee statements are some indication of employee dissatisfaction. However, they are entitled to little weight to the extent they purport to convey the sentiments of employees other than themselves. Otherwise, a few antiunion employees could provide the basis for a withdrawal of recognition when in fact there is actually an insufficient basis for doubting the Union's continued majority. Since those who expressed antiunion sentiments were few in number, we conclude that Respondent could not rely heavily on these expressions in refusing to bargain.

With regard to the statements made by Stevens and Quilici to Petricciani, the Board adopted the Administrative Law Judge's findings in *United Aircraft Corporation,* 168 NLRB 480 (1967); wherein it has stated at TXD page 486:

> Of prime importance is the fact that evidence of dissatisfaction with a collective-bargaining agent duly selected and long accepted and utilized as the means for obtaining successive improvements in conditions of employment must properly come from the employees themselves, if it is to carry any weight, and not from the employer on their behalf.

After considering the Board and court precedents cited above and applying them to the factors, considered together,

which were relied upon by Petricciani in this case, I conclude that the Respondent has not rebutted the General Counsel's *prima facie* case by showing that it had a reasonably based doubt, which was based upon objective considerations, of the Union's presumed majority status at the time that the Respondent withdrew recognition from the Union.

With regard to the other defense which the Respondent raised under *Terrell Machine* and the other cases cited previously, there is no evidence on this record which establishes that the Union, in fact, did not enjoy majority status at the time that the Respondent withdrew recognition. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act by withdrawing recognition from the Union and by refusing to bargain with the Union on December 20, 1974.

## IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the foregoing findings of fact and upon the entire record, I make the following:

## V. *Conclusions of Law*

1. Finally, Inc., d/b/a Palace Club, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

4. At all times material herein, the Union has been, and is, the exclusive representative of all employees in the above-described appropriate unit for the purposes of collective bargaining.

5. By withdrawing recognition from the Union and by refusing to bargain with the Union as the exclusive bargaining representative of the employees in the unit described above, concerning the wages, hours, working conditions and other terms and conditions of employment of the employees in the unit, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

## VI. *The Remedy*

Having found that the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the following recommended:[11]

## ORDER

The Respondent, Finally, Inc., d/b/a Palace Club, its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Refusing to recognize and bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate bargaining unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

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11. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Recognize and, upon request, bargain collectively with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees, and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

> All employees employed by the Respondent in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors as defined in the Act.

(b) Post at its Reno, Nevada, place of business copies of the attached notice marked "Appendix."[12] Copies of the notice on forms provided by the Regional Director for Region 20 after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material.

---

12. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: Aug. 19 1976

.....

Roger B. Holmes
*Administrative Law Judge*

SEAL NOTICE TO EMPLOYEES SEAL

Posted by Order of the
National Labor Relations Board
*An Agency of the United States Government*

After a trial at which all parties had the opportunity to present evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and has ordered us to post this Notice.

WE WILL recognize and, upon request, bargain with Hotel-Motel-Restaurant Employees & Bartenders Union, Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the appropriate unit described below, with regard to the wages, hours, working conditions, and other terms and conditions of employment of the unit employees and if an understanding is reached, embody such understanding in a signed agreement. The unit found appropriate for the purposes of collective bargaining is:

All employees employed by the Employer in its bar and culinary operations at its Reno, Nevada, place of business, excluding all other employees, guards and supervisors, as defined in the Act.

WE WILL NOT refuse or fail to do the foregoing and WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

FINALLY, INC., d/b/a PALACE CLUB
(Employer)

Dated..... By.....
(Representative) (Title)

---

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 13018 Federal Bldg., Box 36047, 450 Golden Gate Avenue, San Francisco, California, 94102. Telephone: (415) 556-0335.

No. 80-660

# In the Supreme Court

OF THE

## United States

OCTOBER TERM, 1980

SILVER SPUR CASINO,
*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD, *and*
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION,
LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS
INTERNATIONAL UNION, AFL-CIO,
*Respondents*

*And Related Cases*

Supreme Court, U.S.
FILED
NOV 25 1980
MICHAEL RODAK, JR., CLERK

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT UNION'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Board abused its discretion in holding that the presumption of majority status, derived from petitioners' voluntary recognition of the Union as the representative of their own employees, could not be defeated by petitioners' subsequent withdrawal from a multi-employer bargaining unit?

2. Whether the Board's finding that petitioners had not established a reasonably grounded doubt of the Union's majority status was supported by substantial evidence?

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No. 80-660

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1980

SILVER SPUR CASINO,
*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD, *and*
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL-CIO,
*Respondents*

*And Related Cases*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## RESPONDENT UNION'S BRIEF IN OPPOSITION

### OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-27) is reported 623 F.2d 571. The decisions and orders of the National Labor Relations Board are reported at 228 N.L.R.B. 1147 (Silver Spur Casino); 229 N.L.R.B. (Nevada Club, Inc.); and 229 N.L.R.B. 1128 (Finally, Inc. dba Palace Club).

## JURISDICTION

The judgment of the Court of Appeals relating to these petitioners was entered on July 14, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This respondent was not served with a copy of the petition until October 27, 1980.

## STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a), provides in relevant part:

> "It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 • • •;
>
> • • • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees • •."

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), provides in relevant part:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board • • • shall have power to issue and cause to be served upon such person a complaint stating the charges • • • and containing a notice of hearing • • •: *Provided*, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge • • •."

## STATEMENT OF THE CASE

The Brief For the National Labor Relations Board In Opposition herein succinctly and accurately states the case.

## ARGUMENT

### I

### THIS PETITION REITERATES ARGUMENTS ALREADY MADE TO THIS COURT

The instant petition is nothing more than a rehash of arguments already presented to this Court in *N.L.R.B. v. Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget* and *N.L.R.B. v. Nevada Lodge*, 584 F.2d 293 (9th Cir., 1978) *cert. denied* 442 U.S. 921, *reh. denied* 444 U.S. 887 (1979) (United States Supreme Court No. 78-1379)[1] and *Sahara-Tahoe Corporation v. N.L.R.B.*, et al., 581 F.2d 767 (9th Cir., 1978) *cert. denied* 442 U.S. 917, *reh. denied* 444 U.S. 888 (1979) (United States Supreme Court No. 78-1465). In fact, the underlying dispute in all these cases arose from the disintegration of the same multi-employer bargaining unit, and the subsequent refusal of all member employers to bargain with the Union.

This Court's rationale in denying certiorari in those cases is equally applicable here. The "conflict" which petitioners seek to create did not exist when the prior petitions were considered, nor does it exist now. The court below clearly found that petitioners had failed to establish a good faith reasonable doubt to justify its refusal to bargain with the Union, and that their cumulative factual showing was defective, substandard and equivocal.[2] (Pet.

[1]These petitioners' counsel is well aware of this Court's decision in those matters. The same law firm was counsel of record in *Tahoe Nugget* and *Nevada Lodge*.

[2]In fact, petitioners' "evidence" of good faith doubt is not supported by even a gratuitous reading of the record. For example, petitioners state that "the Union through its trustee publicly stated the Union represented only 20% of the employees in the multi-employer unit." (Pet. 7) Nowhere in the record is there such evidence.

App. 8-10). None of the courts of appeal absolve petitioners from the responsibility to produce cogent, unequivocal evidence as the factual predicate for refusing to bargain with the Union.

## II

## THERE IS NO CONFLICT AMONG THE CIRCUITS CREATED BY THE COURT OF APPEAL'S HOLDING THAT THE PRESUMPTION OF MAJORITY STATUS APPLIES IN THIS CASE

The court below correctly recognized that petitioners' voluntary recognition of the Union as the bargaining representative of their respective bar and culinary employees gave rise to a continuing presumption of the Union's majority support among those employees. (Pet. App. 7).[3] As this Court has stated, such recognition without a Union majority would violate the Act. *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 737-739 (1961). Once established, the presumption of majority support continues throughout the term of a collective bargaining agreement and beyond, *Celanese Corp. of America*, 95 N.L.R.B. 664, 672 (1951), cited with approval in *N.L.R.B. v. Burns Security Service*, 406 U.S. 272 n.2 (1972).

On this predicate,[4] the court of appeal adopted the reasoning of *N.L.R.B. v. Tahoe Nugget, supra*, 584 F.2d 293

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[3]The court stated its reliance on *N.L.R.B. v. Tahoe Nugget, supra; N.L.R.B. v. Nevada Lodge, supra; Sahara Tahoe Corp. v. N.L.R.B., supra; N.L.R.B. v. Sierra Development Co.*, 604 F.2d 606 (9th Cir., 1979); *N.L.R.B. v. Carda Hotels*, 604 F.2d 605 (9th Cir., 1979). See also, *N.L.R.B. v. Frick Co.*, 423 F.2d 1327 (3rd Cir., 1970); *N.L.R.B. v. Cayuga Crushed Stone, Inc.*, 474 F.2d 1380, 1383 (2nd Cir., 1973).

[4]Petitioners' continued assertion that the Board adopted some "derivative" presumption flowing from the multiemployer bargain-

at 303, that the presumption subsisted following petitioners' withdrawal from the multiemployer unit:

> "When respondents joined the Association and recognized the Union, they implicitly declared their employees favored the Union. Thus, majority status can be directly inferred from the employer's own conduct; the presumption is not derived from the larger unit's majority, but originates with the employer's implicit declaration of a majority in the single employer unit. Moreover, the original factual inference is convincing: employers normally will not knowingly violate the law and union fraud is rare. Continued membership in the larger unit does nothing to negate this principle even though the larger unit becomes the appropriate one for bargaining. The original presumption subsists: withdrawal from the unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor union representation." (footnote omitted) Pet. App. 6-7.

No case cited by petitioners militates against application of the presumption in the present situation. In *N.L.R.B. v. Alvin J. Bart and Co.*, 598 F.2d 1267 (2nd Cir., 1979) (Pet. 7), the Court *adopted* the presumption of continued majority support described above, and emphasized that rebuttal of the presumption required "clear and convincing evidence of loss of Union support", more than "unfounded speculation or . . . subjective state of mind." *Id.* at 1271. In finding that the employer had presented sufficient objective evidence to rebut the presumption the court relied heavily on an anti-union petition signed by three-fourths of

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ing relationship (Pet. 18) is without foundation. There was no concatenation of presumptions applied here, only the single presumption arising from petitioners' voluntary act of recognition.

the employees in the appropriate unit. *Id.* at 1272. No such objective evidence was presented here.

*W & W Steel Co. v. N.L.R.B.*, 599 F.2d 934 (10th Cir., 1979) (Pet. 8), a case petitioners claim is "on all fours" with the present dispute, involved a successor employer's obligation with respect to an ongoing collective bargaining relationship. The court emphasized that the "critical question" was that of the employer's status as a "successor" and its decision was founded on that status. *Id.* at 936-938. Clearly, no such issue exists here, where the petitioners' obligation to bargain with the Union resulted from their own acts of recognizing the Union as the representative of a majority of their employees when they joined the multiemployer bargaining unit.

Nor is *N.L.R.B. v. Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir., 1965) (Pet. 8-9) in conflict with the Board or court's holding. As petitioners' acknowledge (Pet. 9), in *Kaase* the recognition of the Union was based upon an election of employees within a multiemployer unit rather than by voluntary recognition, as here. In the *Kaase* situation, the Union must receive a majority of votes of the participating employees of all employers in the unit to obtain representative status. Thus, the union may become majority representative even though it did not receive a majority of the employees of each individual employer member of the multiemployer unit. In the present case, the presumption was not derived from union majority in the multiemployer unit, but rather from petitioners' act of voluntarily recognizing the Union as the majority representative of their employees. Petitioners' reliance

on *Kaase* is unavailing. Certainly, no case cited by petitioners holds that the presumption of continued majority support should not be applied here: the purported "conflicts in the circuits" is imaginary.[5]

Nor can petitioners avoid application of the presumption by now claiming that the initial recognition of the Union was unlawful. (Pet. 10-11). Because petitioners' recognition of a minority union would have been an unfair labor practice occurring beyond the six-month limitation period in Section 10(b) of the Act, both the Board and the court of appeal concluded petitioners could not revive a legally defunct unfair labor practice in order to defend against a present refusal to bargain. *Local Lodge No. 1424, I.A.M. v. N.L.R.B.*, 362 US. 411, 416 (1960); *N.L.R.B. v. District 30, U.M.W.*, 422 F.2d 115, 122 (6th Cir., 1969), *cert. denied.* 398 U.S. 959 (1970).

Apart from disallowing petitioners' attack on the validity of the Union's presumption of majority support, the court of appeal also correctly recognized that the circumstances of the initial recognition could not be used to bolster petitioners' claim of subjective good faith in refusing to bargain in 1974. (Pet. 10) Even if the companies' alleged unlawful recognition were admitted to show their good faith in suddenly deciding to accord their employees a free choice of bargaining representative in 1974, the court of appeal concluded that merely subjective belief was not sufficient ground to disrupt the stability of the

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[5]The court below attributed this imaginary "conflict" in part to petitioners' refusal to read entire cases, and instead, to take quotations out of context. (Pet. App. 8 n. 7). Indeed, the cases cited by petitioners herein lend credence to that view.

bargaining relationship. (Pet. App. 7). Consistent with other courts of appeal, the court held petitioners' claimed reasonable doubt could only be sustained by objective facts showing a majority of their employees no longer desired Union representation. *N.L.R.B. v. Tahoe Nugget, supra, N.L.R.B. v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir., 1976), *cert. denied*, 434 U.S. 818 (1978); *Terrell Machine Co v. N.L.R.B.*, 427 F.2d 1088, 1090 (4th Cir., 1970), *cert. denied*, 398 U.S. 929 (1970); *Lodges 1746 & 743, I.A.M. v. N.L.R.B.*, 416 F.2d 809 (D.C. Cir., 1969), *cert. denied*, 396 U.S. 1058 (1970).

As the court stated in *N.L.R.B. v. Tahoe Nugget, supra*, 584 F.2d 293 at 300:

> "We hold the employer is free to act on the objective grounds before him, regardless of his underlying motivation. If union support is lacking, the employer's action actually furthers the cause of employee democracy by overcoming the intertia which helps maintain the status quo. Since the employer's action is not in derogation of employee rights, his subjective motivation is important only evidentially. In sum, when challenging the union majority, good faith is demonstrated if the employer is aware of the facts manifesting lack of union support and employer misconduct did not contribute to the loss of support." (footnotes omitted)

Contrary to petitioners' assertion (Pet. 11), neither of the court of appeal's grounds for excluding evidence of the claimed unlawful initial recognition conflicts with the Sixth Circuit's decision in *N.L.R.B. v. Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir., 1973). In *Dayton Motels*, as

in this case, the court held that circumstances establishing an unfair labor practice at the time of initial recognition of the union could not ". . . constitute an attack on the validity of the expiring agreement or on the presumption created thereby, which attack was barred by Section 10(b) of the Act." *Id.*, 474 F.2d at 333. Consistent with the Ninth Circuit and other cases in that Circuit, it held that the employer must show both reasonable grounds for doubting the union's majority status, and good faith in asserting that doubt. *Id.*, 474 F.2d at 330; *Bally Case & Cooler, Inc. v. N.L.R.B.*, 416 F.2d 902 (6th Cir. 1969); *N.L.R.B. v. Washington Manor Inc.*, 519 F.2d 750 (6th Cir. 1975). Nevertheless, the court held, evidence of fraudulent procurement of authorization cards at the union's initial recognition was material to show the employer's subjective good faith in refusing to bargain. *Id.*, 474 F.2d at 334.

Evidence of an employer's subjective good faith could be relevant where it had already established objective grounds for doubting a union's majority status. *E.g.*, *Bally Case & Cooler, Inc. v. N.L.R.B.*, *supra*. Consistent with the decision in *N.L.R.B. v. Tahoe Nugget*, *supra*, 584 F.2d 293 at 300n. 24, since petitioners here had not established reasonable grounds for doubting the Union's majority status, their protestations of good faith were therefore immaterial, and the circumstances of initial recognition irrelevant:

> "If, but only if, the employer can show the union's majority is truly in doubt, the situation confronted is at the opposite end of the spectrum from the situation where the employer's conduct is inherently de-

> structive of employee rights. It follows that not only is proof of anti-union motivation then unnecessary, but it is immaterial to the charge. We emphasize, however, that the employer must have ample evidence in support of his doubt before we can condone this assumption of the cause of employee democracy."

The court's application of the presumption was consistent with the other circuits. Petitioners' argument is reduced to a quibble regarding the sufficiency of its evidentiary presentation which will be discussed below. Most importantly, petitioners have ignored uniform Board and court recognition that policy considerations militate in favor of the presumption in this case. The presumption facilitates attainment of the Act's underlying purpose: industrial peace. Conversely, permitting petitioners to refuse to bargain with the Union after a long bargaining relationship in pursuit of asserted but unexercised employee rights is antithetical to that goal. *Brooks v. N.L.R.B.*, 348 U.S. 96, 103 (1954); *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 490 (2d Cir., 1975); *N.L.R.B. v. Tahoe Nugget, Inc., supra*, 584 F.2d 293, 301.

## III

## THE COURT OF APPEAL AND BOARD PROPERLY ASSESSED THE CUMULATIVE IMPACT OF FACTORS CLAIMED TO SUPPORT PETITIONERS' REASONABLE DOUBT

Petitioners' final contention is that the Board and court have created an irrebuttable presumption. (Pet. 21-25). This contention has no merit. Petitioner has confused the concept of "unrebuttable presumption" with its own failure to produce sufficient evidence to rebut the presumption.

The record is replete with patient consideration of petitioners' evidence by both the Board and the court.[7] Although petitioners were given every opportunity to present their evidence, the evidence was found by the court to be "ambiguous". (Pet. App. 10). This finding reflects that the decisions below were not the product of an unrebuttable presumption, but rather of petitioners' failure to produce evidence sufficient to rebut the presumption. No case or authority cited by petitioners permit them to meet their burden of proof through speculative or conjectural evidence. Their assertion of "conflicting decisions" is again unavailing.

Petitioners' argument that the court did not consider the cumulative effect of their purported objective considerations is insulting. (Pet. 6-7, 15). Even a cursory reading of the court's opinion establishes that the purported objective considerations were analyzed cumulatively and were still found to be deficient.

The court stated:

> "Whether an employer has established a good faith reasonable doubt defense is a determination that must be made initially by the Board. The Board's decision will be upheld if it is supported by substantial evidence on the record as a whole. *Sahara Tahoe Corp. v. N.L.R.B.*, 581 F.2d at 771.

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[7]Petitioners also imply that they have established certain "facts". (Pet. 17-18). In fact, the evidence was found to be either irrelevant or subjective in that it did not indicate how the petitioners' employees felt about continued Union representation. Petitioners' continued reliance on those factors at this date indicate their failure to come to grips with the reality that the evidence presented did not rise to a level sufficient to rebut that presumption.

> In *Tahoe Nugget* and *Sahara-Tahoe* we stressed that the evidence presented to establish reasonable good faith doubt, individually *or cumulatively*, must unequivocally indicate that union support had declined to a minority. In those cases the Board found that the employers had not established the good faith doubt defense. Some evidence was presented of employee discontent, high employee turnover rates, low union membership, financial difficulties of the union, and a vigorous union membership drive. However, after evaluating the evidence, the Board determined that the evidence introduced by the respondents was not sufficient to support a good faith reasonable doubt of the union's majority status. The evidence, standing alone *or viewed in their totality*, presented only an ambiguous inference of loss of majority support for the union. We enforced the Board's orders in those cases, determining that there was substantial evidence on the record as a whole to support the findings.
>
> The evidence presented here does not differ materially from that considered by the Board and this court in *Tahoe Nugget* and *Sahara-Tahoe*. The Board in the present cases found that the respondents failed to establish the good faith reasonable doubt defense. Substantial evidence on the record as a whole supports the findings that the evidence, individually or *cumulatively*, presents only an equivocal inference of loss of majority support for the union." (Emphasis supplied) Pet. App. 9-10

In adopting the reasoning of *Sahara Tahoe Corp. v. N.L.R.B., supra*, 581 F.2d 767, 772, the court further explained that it was rejecting petitioners' "evidence" in its *totality*. There, the court stated:

> ". . . the *cumulative* weight of all of the evidence is not enough to rebut the presumption. It is ambiguous at best and we see no reason to disturb the Board's finding that the web [of circumstances] contains not a single thread of evidence that the employees themselves had told [the Hotel] that they no longer wanted the Union to represent them. Indeed, the web contains not a single thread of evidence that reflects or even purports to reflect the sentiments of the employees themselves—any unit employee much less a majority of the unit employees—on the question of union representation. Absent such threads, the web of circumstances is like the Cheshire cat's grin—nothing behind it."

The Board also considered the cumulative effect of the evidence, and found it deficient even on that basis. (Supp. App. 13, 57, 101). Petitioners' argument is thus reduced to a claim that the Board erred in the evidentiary weight accorded each of petitioners' asserted objective considerations since similar factors, *once established*, had previously been held to justify a refusal to bargain. (Pet. 17-18). In essence, this is a confession that petitioners engaged in brinksmanship in attempting to thwart collective bargaining among its employees. As another court of appeals stated in an analogous context, ". . . one who engages in 'brinksmanship' may easily overstep and tumble into the brink." *Wausau Steel Corp. v. N.L.R.B.*, 377 F.2d 369, 372 (7th Cir., 1967). Clearly, petitioners' disagreement with the Board's findings with respect to the weight of the evidence, or factual conclusions to be drawn therefrom, does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 490-491 (1951). Moreover, because

such an evidentiary determination turns on the totality of all the circumstances, review of the Board's findings cannot have a substantial impact on other litigants.

## CONCLUSION

For all the above reasons, as well as for the reasons stated in the Brief For The National Labor Relations Board In Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 80-660

# In the Supreme Court of the United States

OCTOBER TERM, 1980

SILVER SPUR CASINO, ET AL., PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

---

### QUESTION PRESENTED

Whether the Board properly concluded that petitioners violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with the union without having a reasonably based good-faith doubt of the union's majority support among their employees.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 623 F.2d 571. The decisions and orders of the Board (Pet. Supp. App. 1-107) are reported at 228 N.L.R.B. 1147 (*Silver Spur*), 229 N.L.R.B. 1186 (*Nevada Club*), and 229 N.L.R.B. 1128 (*Finally, Inc.*).

## JURISDICTION

The judgments of the court of appeals (Pet. App. 25-34) were entered on July 14, 1980. The petition for a writ of certiorari was filed on October 11, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

1. Section 8(a) of the National Labor Relations Act, 29 U.S.C. 158(a), provides in part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 * * *;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees * * *.

2. Section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b), provides in part:

> Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * shall have power

to issue and cause to be served upon such person a complaint stating the charges * * * and containing a notice of hearing * * *: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *.

**STATEMENT**

1. Each of the petitioners (Silver Spur Casino, Nevada Club and Finally, Inc., d/b/a Palace Club) operates a bar, restaurant and casino in Reno, Nevada (Pet. Supp. App. 5, 22, 69). In 1951, Nevada Club became a member of the Reno Employers Council (the "Association") (*id.* at 24). In 1968 and 1969, Silver Spur and Finally, Inc. also joined the Association (*id.* at 6, 71). The Association represents its members in collective bargaining with various unions, including Hotel-Motel-Restaurant Employees and Bartenders International Union, AFL-CIO (the "Union") (*id.* at 71). When petitioners joined the Association, they became parties to the then existing collective bargaining agreement between the Union and the Association. In doing so, they recognized the Union as the representative of their bar and culinary employees (*id.* at 6).

In December 1974, petitioners announced their withdrawal from membership in the Association (Pet. Supp. App. 6, 26, 71). Thereafter, petitioners refused the Union's request to enter into collective bargaining on an individual basis. Petitioners claimed that they had a genuine doubt that the Union represented an uncoerced majority of their employees. (*Id.* at 74-75.)

2. Unfair labor practice charges were then filed by the Union. The Board concluded that petitioners

had violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from and refusing to bargain with the Union on an individual basis without having a reasonably based good-faith doubt of the Union's continued majority support among their employees (Pet. Supp. App. 2, 13, 57, 64, 102).

Relying on its decision in *Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget*, 227 N.L.R.B. 357 (1976), enforced, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979), the Board held that petitioners' voluntary recognition of the Union established a presumption that the Union possessed the majority support of their employees, and that this presumption survived despite petitioners' withdrawal from the multi-employer bargaining unit (Pet. Supp. App. 13, 44-45, 65). In light of this presumption, the Board concluded that petitioners were not entitled to withdraw recognition from the Union unless they could establish that the Union in fact no longer represented a majority of their employees or that petitioners had a reasonable doubt as to the Union's continuing majority status (*id.* at 13, 45-46, 95). The Board determined that the evidence relied upon by petitioners to establish a reasonable doubt of majority status was insufficient to make either showing (*id.* at 8-12, 49-57, 95-102).[1]

---

[1] In asserting its doubt as to the Union's majority support, Nevada Club relied upon newspaper articles concerning organizing efforts to overcome low union membership and alleged financial difficulties in the Reno area, high turnover of unit employees, Union inactivity in representing employees, reports of employee dissatisfaction with the Union, and Nevada's status as a right-to-work state. The Administrative Law Judge, upon considering all these factors, concluded that Nevada Club had failed to "show[] that it had a reasonably based doubt, which was based upon objective considera-

3. The court of appeals, relying on its prior decisions in *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Sahara-Tahoe Corp.* v. *NLRB*, 581 F.2d 767 (9th

---

tions, of the Union's presumed majority status at the time [the company] withdrew recognition from the Union" (Pet. Supp. App. 57). He pointed out that the newspaper articles covered the entire geographic area and were not limited to Nevada Club's bar and culinary employees (*id.* at 52). He explained that Nevada Club's reliance on turnover was ineffective because, under Board precedent, new employees are presumed to support the union in the same ratio as the old (*id.* at 53-54). Concerning the contention that the Union had filed no grievances, the Administrative Law Judge noted that there was no showing that grievances were warranted; he also noted that a Union representative had frequently visited the premises and had not been requested to file grievances by the employees (*id.* at 49). Regarding the purported employee dissatisfaction with the Union, the Administrative Law Judge observed that the evidence concerned only a few employees in a unit of approximately 105 employees and that such a small percentage "hardly constitutes a sufficient objective consideration warranting a refusal to bargain" (*id.* at 55-56). The Administrative Law Judge noted that there was an important "distinction * * * between union membership and union support," and concluded that, because "union membership [is] voluntary in this right-to-work State," lack of union membership could not be relied upon as evidence of lack of Union support (*id.* at 51).

Silver Spur also relied on alleged Union financial difficulty and organizational activity, turnover, lack of grievance activity and reported employee dissatisfaction with the Union (Pet. Supp. App. 8-12). As to the latter, the Administrative Law Judge noted that there were only four employees out of a total of 100 whose statements could be considered to reflect opposition to the Union. The reports of employee dissatisfaction that were made by the employer's supervisors, he concluded, were "labored, inept, and [so] lacking in consistent

Cir 1978), cert. denied, 442 U.S. 917 (1979); *NLRB* v. *Sierra Development Co.*, 604 F.2d 606 (9th Cir. 1979); and *NLRB* v. *Carda Hotels, Inc.*, 604 F.2d 605 (9th Cir. 1979), upheld the Board's decisions and enforced its orders (Pet. App. 1-34). The court agreed with the Board that the presumption that the Union represented a majority of the employees remained applicable to the individual employer units

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or meaningful detail as to suggest * * * that the employee manifestations of anti-union feeling on which they reputedly were based also were grossly overblown * * *." (*id.* at 12.)

Finally, Inc., relied on the same reports of financial difficulty and organizing activity, turnover, lack of grievance activity and reports of employee dissatisfaction with the Union (Pet. Supp. App. 95-101). The Administrative Law Judge noted that here, too, the expressions of employee dissatisfaction came from a small percentage of the total unit (three out of 110). Accordingly, he concluded they were entitled to little weight (*id.* at 100-102).

In an effort to prove that the Union in fact no longer enjoyed majority support, all three employers sought to adduce testimony from Union business representative Lawrence as to whether there existed union business records demonstrating that the Union represented a majority of the unit employees. In each case, the Board rejected the proffered evidence. The Board reasoned that, since union membership was voluntary in the State of Nevada, record evidence concerning the extent of union membership would be irrelevant to determining whether a majority of employees desired union representation. (Pet. Supp. App. 2, 40, 64.) The employers also sought to adduce testimony from a Board field examiner regarding his examination of the Union's business records and his alleged statement to counsel for the petitioners that the unfair practice charges were to be dismissed. The Board concluded that testimony on these subjects by the field examiner fell within the evidentiary privilege protecting informal investigatory and trial preparatory processes of regulatory agencies. Accordingly, the Board revoked the subpoenas for the Board agent's testimony (*id.* at 2 n.1, 64).

upon their withdrawal from the multi-employer unit. The court explained (*id.* at 7 n. 6):

> In the formation of multi-employer units, it is an unfair labor practice for an individual employer to voluntarily recognize a union which does not enjoy majority support among that employer's employees. Thus when employers join a multi-employer unit and recognize the union, they are viewed as implicitly declaring that the majority of their employees favor the union. Subsequent withdrawal from the multi-employer unit simply entails a reversion to the original unit, a unit previously determined from the employer's own conduct to favor the union's representation * * *.

The court noted that the evidence presented in the instant cases did not differ materially from that in *Tahoe Nugget* and *Sahara-Tahoe*, and concluded that there was substantial evidence to support the Board's finding that the petitioners had failed to establish a good-faith doubt as to the Union's continuing majority status (*id.* at 9-10).[2]

The court agreed with the Board that the evidence that petitioners sought to adduce from the Board field examiner (see note 1, page 5, *supra*) was protected by the privilege preserving the confidentiality of investigative files (Pet. App. 12). The court disagreed with the Board, however, concerning the petitioners' efforts to prove actual loss of majority through

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[2] The court noted that in this case, as in *Tahoe Nugget* and *Sahara-Tahoe*, some evidence was presented by the employers of employee discontent, high turnover, low membership, financial difficulty and a vigorous union membership drive. Such evidence, the court concluded, "individually or cumulatively, presents only an equivocal inference of loss of majority support for the union" (Pet. App. 9-10).

Union membership records. The court reasoned that "[u]nion membership, even in a right-to-work state, is some indication of union support, though it may be only marginally relevant" (*id.* at 12-13; citations omitted). Nonetheless, the court concluded that the Board's ruling sustaining objections to the questioning of the Union business agent was not prejudicial. The court explained (Pet. App. 13; footnote omitted):

> The question asked by the respondents was whether the Union could produce any records that would demonstrate that it had the majority support of the employees * * *.
>
> If the Union had answered the question affirmatively, the Union's position would have been bolstered. If the question had been answered in the negative, that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption would not have been rebutted. Therefore, we find no error that would require a reversal.

## ARGUMENT

1. This case presents essentially the same issues and factual circumstances as were presented in *Tahoe Nugget* and *Sahara-Tahoe, supra.* Certiorari was denied in those cases and petitioners have presented no new arguments which dictate a different result here. Petitioners do not dispute the settled proposition that majority support is presumed to continue following certification or voluntary recognition and that, absent unusual circumstances, the presumption is irrebutable for one year, and thereafter may be rebutted only if the employer shows that the union was actually in the minority or that the employer had a good-faith

reasonable doubt of the union's continued majority support at the time of the refusal to bargain (Pet. App. 5-6). Rather, petitioners essentially contend that the decision of the court of appeals that the presumption was not rebutted here conflicts with numerous other decisions. There is no merit to that contention.[3]

1. Relying on *NLRB* v. *Richard W. Kaase Co.*, 346 F.2d 24 (6th Cir. 1965), petitioners claim (Pet. 8-9) that the presumption of continuing majority status in the individual units has been improperly derived from the Union's status as representative for the multi-employer unit. However, the presumption in this case is not based on the fact that the Union had majority support in the multi-employer unit, but rather on the fact that each petitioner had voluntarily recognized the Union as representative of its employees at the time it joined the multi-employer group (Pet. App. 7 n.6; Pet. Supp. App. 42, 93). In contrast, in *Richard Kaase*, the union's position as majority representative originated with an election in

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[3] Petitioners assert (Pet. 12-13) that the court of appeals acknowledged that its decision conflicts with those of other circuits. However, the court below merely stated (Pet. App. 14-15 n.9) that, of the numerous cases cited to it by petitioners, three "present factual situations in which other circuits may have found the presumption of majority support rebutted upon similar or weaker evidence than presented in these cases." Those three cases are distinguishable from the present case. In *Ingress-Plastene, Inc.* v. *NLRB*, 430 F.2d 542, 547 (7th Cir. 1970), and *Star Mfg. Co.* v. *NLRB*, 536 F.2d 1192 (7th Cir. 1976) (and see 220 N.L.R.B. 582, 583 (1975) (dissenting opinion of then Chairman Murphy)), unlike here, the union had been derelict in its representational duties. The third case, *W & W Steel Co.* v. *NLRB*, 599 F.2d 934 (10th Cir. 1979), is discussed at page 9, *infra*.

the multi-employer unit.[4] No evidence showed that the Kaase employees ever independently desired union representation. Accordingly, the fact of majority status in the single employer unit had never been established in *Richard Kaase*, as it was here by the petitioners' voluntary recognition of the Union. See *Tahoe Nugget, Inc.* v. *NLRB*, *supra*, 584 F.2d at 303 n. 36.

Petitioners' reliance on *W & W Steel Co.* v. *NLRB*, 599 F.2d 934 (10th Cir. 1979), is also unwarranted. In that case, the union's status as majority representative at the Lubbock, Texas plant was based upon an election in a seven plant unit. Ballots from all plants were commingled and it was not known how the Lubbock plant employees had voted. Nor was other evidence adduced to show that the Lubbock plant employees ever independently desired union representation. Thus the union's majority at the single plant had never been established as it was here. The Tenth Circuit, in denying enforcement of the Board's bargaining order in that case, also relied upon the fact that W & W Steel Co. was a successor of the company that operated the Lubbock plant at the time of the original Board election and, further, that W & W Steel Co. took control with no knowledge of the union's presence at the plant. 599 F.2d at 938.

Contrary to petitioners' contention (Pet. 9-10, 13-18), both the Board (Pet. Supp. App. 13, 57, 95, 101) and the court of appeals (Pet. App. 9-10) expressly considered the cumulative effect of the evidence advanced by petitioners concerning the ex-

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[4] In a multi-employer election, the union must receive a majority of the votes of the participating unit employees, but does not have to secure a majority from the employees of any individual employer.

istence of a good-faith doubt of the Union's majority status. The court below correctly concluded that substantial evidence supports the Board's findings that petitioners did not have a good-faith doubt of the Union's majority support, and further review of that fact-bound issue is not warranted. *Universal Camera Corp* v. *NLRB*, 340 U.S. 474, 490-491 (1951).[6]

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[6] Petitioners err in stating (Pet. 7) that the facts in *NLRB* v. *Alvin J. Bart & Co.*, 598 F.2d 1267 (2d Cir. 1979) were "substantially" weaker than those here. In Bart, "three-fourths of the unit members signed [an] anti-union petition" (*id.* at 1272), a fact to which petitioner does not allude. Similarly, petitioners erroneously rely (Pet. 10-12) on *NLRB* v. *Dayton Motels, Inc.*, 474 F.2d 328 (6th Cir. 1973), for the proposition that, despite the six-month time limitation in Section 10(b) of the Act, 29 U.S.C. 160(b), it was entitled to rebut the presumption of continuing majority status by showing that the Union did not enjoy majority status when it was voluntarily recognized by petitioners. In *Dayton Motels*, the employer had sought to prove, in defense to a refusal to bargain charge, that the authorizations obtained to secure union recognition more than six months before the charge was filed were obtained by a supervisory employee who had collaborated with the union and that this fact had been fraudulently concealed from the employer. The Sixth Circuit observed that it was permissible "for the Company to show that it discovered, more than one year after the collective bargaining agreement was signed, the complicity of its supervisor and the concealment by the Union of its misconduct." *Id.* at 334. Here, however, as in *Tahoe Nugget, Inc.*, petitioners seek to introduce evidence of the Union's lack of majority support at the time of the Union's initial recognition for the very purpose of attacking the validity of the presumption of continuing majority status. Moreover, there is no evidence in this case of any fraudulent concealment of misconduct that would lift the six-month restriction of Section 10(b). See *International Ladies' Garment Workers Union* v. *NLRB*, 463 F.2d 907, 922 (D.C. Cir. 1972).

2. Petitioners further assert (Pet. 21-25) that they were barred from introducing evidence that would have demonstrated that the Union was actually lacking in majority support. The question that was asked by the petitioners was whether the Union could produce any records that would demonstrate that the Union had the majority support of the employees. The court of appeals concluded (Pet. App. 13) that, even if the Union had answered the question in the negative, "that would have presented only slight evidence that the Union in fact did not have the majority support of the employees. Even with the addition of this evidence, the presumption [of majority support] would not have been rebutted." Thus, the only question presented is whether, on the instant facts, the court below correctly concluded that petitioners were not prejudiced by the evidentiary ruling. That question turns on the particular circumstances presented here and does not warrant this Court's review.[6]

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[6] Contrary to petitioners' contention (Pet. 23-24), the decision of the court of appeals on this issue is not in conflict with *Automated Business Systems* v. *NLRB*, 497 F.2d 262 (6th Cir. 1974). In *Automated Business Systems*, the employer had sought to introduce affirmative evidence regarding the number of employees who had supported a decertification petition and expressed a desire not to be represented by the union. Here, however, the petitioners sought to demonstrate only the *absence* of documentary evidence that a majority of employees were members of the Union.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AND RELATED CASES.

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# REPLY BRIEF FOR PETITIONERS

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# REPLY BRIEF FOR PETITIONERS

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## I.

## PRIOR CASES BEFORE THIS COURT RELIED ON BY THE BOARD AND THE UNION BUT NOT INVOLVING PETITIONERS NOR ISSUES PRESENTED HERE SHOULD NOT BE CONTROLLING

The Board and the Union assert that the instant cases present "a rehash of arguments already presented to this Court" in N.L.R.B. v. Tahoe Nugget, Inc.,

d/b/a Jim Kelley's Tahoe Nugget and Nevada Lodge, 584 F.2d 293 (9th Cir. 1978), cert. denied, 442 U.S. 921, and Sahara-Tahoe Corp. v. N.L.R.B., 581 F.2d 767 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979). [Bd. Brief in Opp., pp. 4-5; Union Br. in Opp., p. 3.] This assertion ignores the declaration of the Ninth Circuit that in the instant cases:

> We recognize the force of [petitioners] contention that the Board has accorded too much weight to the presumption in these cases. This issue involves an important and difficult question which is of current national interest in the labor relations field. Respondents cite cases in other circuits which may have found the presumption rebutted upon similar or even weaker evidence than was presented in these cases. (fn.) [The footnote cites the cases from the other Circuits.] (Emphasis added. App. p. 14)

The Ninth Circuit opinion here is at odds with eight other circuits. Several of the cases Petitioners cited in the lower court were decided after this Court considered the Tahoe Nugget, Nevada Lodge

and Sahara-Tahoe decisions, as well as these cases involve separate issues. Further, the court below "accept[ed] arguendo that a conflict exists on the issue" (App. p. 14), which was not conceded in those earlier decisions. This "important and difficult question ... of current national interest" warrants the careful attention and consideration of this Court. Tahoe Nugget, Nevada Lodge and Sahara-Tahoe should not control as different, distinct issues are presented there.[1/]

By rejecting the analysis and authority of the other circuit courts of appeal, the Ninth Circuit has created

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1/ Justice White would have granted certiorari in Tahoe Nugget and Nevada Lodge. 442 U.S. 921. Further, several cases cited by the lower court here were not decided at that time. See, e.g., W & W Steel v. N.L.R.B., 599 F.2d 934 (10th Cir. 1979).

and conceded a clear, real and disrupting conflict among the circuits.[2/] That conflict is not "imaginary" [Union Br. in Opp., p. 7; Bd. Br. in Opp., p. 8].

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2/ The Court listed those conflicting decisions in footnote 9 (App. p. 14):

> Respondents have cited cases from various circuits where the presumption of majority support was deemed rebutted. See, e.g., Ingress-Plastene, Inc. v. N.L.R.B., 430 F.2d 542 (7th Cir. 1970); Star Manufacturing Co. v. N.L.R.B., 536 F.2d 1192 (7th Cir. 1976); Lodges 1746 & 743, Int'l Ass'n of Mach. & Aero Workers v. N.L.R.B., 416 F.2d 809 (D.C. Cir.), cert. denied, 396 U.S. 1058, 24 L.Ed.2d 752, 90 S.Ct. 751 (1970); Teamsters Local U. 769 v. N.L.R.B., 532 F.2d 1385 (D.C. Cir. 1976); National Cash Register Co. v. N.L.R.B., 494 F.2d 189 (8th Cir. 1974); National Car Rental System v. N.L.R.B., 594 F.2d 1203 (8th Cir. 1979); N.L.R.B. v. Alvin J. Bart & Co., Inc., 598 F.2d 1267 (2d Cir. 1979); W & W Steel Co. v. N.L.R.B., 599 F.2d 934 (10th Cir. 19790; Automated Business Systems v. N.L.R.B., 497 F.2d 262 (6th Cir. 1974); N.L.R.B. v. Nu Southern Dyeing & Finishing, Inc., 444 F.2d 11 (4th Cir. 1971); N.L.R.B. v. Randall-Eastern Ambulance Service, Inc., 584 F.2d 720 (5th Cir. 1978).

The Court below, the Board and the Union have conceded the existence of that conflict, or failed to show it does not exist. Even the dissent in W & W Steel, which the lower court, Board and Union failed to distinguish, recognized at 599 F.2d 942, n. 4, the conflict created by the Ninth Circuit, "acknowledg[ing] that this presumption has not received universal acclaim", citing N.L.R.B. v. Tahoe Nugget, supra. In sum, the conflict which the lower court concedes, and the Board and Union gloss over, is an important and recurring one which this Court should resolve to maintain uniformity among the circuits in a major area of national labor relations and federal labor policy.

## II.

## THE BOARD-CREATED PRESUMPTION EFFECTIVELY ABROGATES PART OF THE NATIONAL LABOR RELATIONS ACT

The Board and Union argue that Petitioners simply did not overcome the so-called rebuttable presumption and rely on Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951), to preclude "further review of that fact-bound issue." [Bd. Br. in Opp., pp. 10-11; Union Br. in Opp. pp. 10-13.] From the Union trustee's public concession that "less than 20 percent of the Reno-Tahoe area is unionized" (Supp. App., pp. 9, 13) and 11 other areas of evidence disclosing the clear lack of Union majority status [Pet. Op. Br., pp. 7, 17-18] to Petitioners' unsuccessful attempts to produce documents and other evidence from the Board and Union of further support to the conclusion that the Union lacked any

majority status, Petitioners met a stone wall. [Pet. Op. Br., pp. 21-25]

The result was a conclusive presumption created by Board fiat and adopted by the court below in contravention of federal labor law, federal evidence rules and fundamental rights of due process. By this conclusive presumption, upon which the Union's unfair labor practice charges were solely based, the Board permitted such charges to block Petitioners' attempts for single-unit elections. The statutory right of the employer to seek an election under Section 9(c) of the NLRA [29 U.S.C. §159(c)] was abrogated here by such Board fiat and the lower court's approval. This is diametrically opposed to the Congressional purpose of Section 9(c), "which gives [the employer confronted with a claim for recognition or a claim of majority support] the right to go to the Board and say 'I want an

election. I want to know who is the bargaining agent for my employees.'" 93 Cong.Rec. 3838 (1947) (Remarks of Senator Taft.) Accord, Linden Lumber Division, Summer & Co. v. N.L.R.B., 419 U.S. 301, 308, 95 S.Ct. 429, 433 (1974). In N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918 (1969), this Court emphasized that the most traveled route for a union to obtain recognition as the exclusive bargaining representative:

> ... is through the Board's election and certification procedures under §9(c) of the Act [29 U.S.C. §159(c)]; it is also, from the Board's point of view, the preferred route. (395 U.S. at 596)

* * * *

> The Board itself has recognized, and continues to do so here, that secret elections are generally the most satisfactory -- indeed the preferred -- method of ascertaining whether a union has majority support. (Emphasis added.) (395 U.S. at 602)

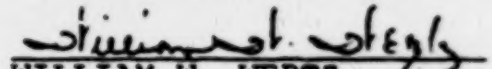
In short, the presumption abrogates the Petitioners' statutory right, to paraphrase Senator Taft, "to know who is the bargaining agent for [their] employees."

## III.

## CONCLUSION

The issues raised by Petitioners are constantly recurring ones affecting federal labor law and policy. Further, the conflict among the circuits discloses the confused state of national labor relations law administration on these issues, which should not be allowed to continue by the happenstance of the circuit court involved, but rather should be settled by clear, final resolution by this Court.

Respectfully submitted,



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